



EU External Human Rights Policy In Search for a Framework of Evaluation

Karolina Podstawa

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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Summary

This PhD thesis offers a critical overview of the instruments used for the attainment of objectives in the realm of the EU external human rights policy through bringing to the surface the implicit theoretical premises on which evaluation of the policy is performed. The analysis is based on the recent review of the whole policy area finalized with the adoption of the Strategic Framework and Action Plan for Human Rights and Democracy (25 June 2012).

In the course of this study three hypothesis are explored and given substance on the basis of selected examples from the toolbox: The existence of the assumption as to the required design of the EU external human rights policy is investigated on the basis of the critiques that can be traced in the literature of the subject. The thus identified underlying rule of law paradigm is subsequently used to scrutinize the creation, application, and judicial overview of the instruments used in the EU external human rights policy field. The exercise permits to uncover the features of toolbox's elements that are not given due consideration, should solely rule of law lens be used for the policy evaluation. Finally, the alternative means of analyzing the policy is offered creating the expanded list of benchmarks which build on new modes of governance theory and amount to an alternative framework through which the EU external human rights policy could be evaluated.

In general terms, there are two conclusions to be drawn from the exercise performed by this study. Sensu largo, it demonstrates that on borderlines of legal systems, governance practices are reality. Therefore, their characteristic features should (and in recent practice are) be appreciated parallelly to those of rule of law - especially at the stage of norm application. Sensu stricte, for the EU external human rights policy, the application of the governance paradigm allows for fuller appraisal of a policy finally paying dues to its unquestionable virtues, and pinpointing in the most solid manner its vices.

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Introduction

If we were to ask ten randomly selected individuals whether the EU sufficiently promotes and enforces human rights abroad, the responses would be by and large negative, at best given in the form of a shrug of the shoulders. If we were to ask the same question to a well-informed academic, NGO representative, or a politician, the answers received would be possibly more nuanced but conveying a similar, rather critical view. Curiously, no matter who is the author of the critique, the impression of the EU actions' inadequacy prevails. The EU thinks too long, does not speak out in time, nor does it act sufficiently. Its clear responses to human rights abuses come infrequently, neither at times of war, nor at times of peace.¹

Such a view on the EU external (and internal) human rights policy has been a standing one at least for the past 15 years and hence the beginning of discussions on the shape of the future Union that materialised with the Treaty of Lisbon entering into force in 2009. There exists a vast amount of literature analysing all possible aspects of the internal and external human rights policy of the European Union.² Conclusions are infrequently positive, and whilst acknowledging the progress of the Union in this area, the authors above all emphasise the insufficient legal framework, incoherent practice, and lack of legitimacy on the part of the EU to pursue human rights related goals.

Yet, even though the incoherence of the EU actions is the fact, it seems unlikely that such a complex legal and political framework does not operate and thus is hardly effective. The disbelief that a policy which has developed since the 1970s³ is indeed a glass half empty has been a driving force behind the considerations presented below.

The general critical approach of the commentators has, clearly, a firm grounding in facts - it is a fact that in specific circumstances the EU does or does not react, as it is a fact that it does not use its legal instruments to their fullest capacity. However, such a consideration of

¹ Which has been well illustrated in the context of 2014 conflicts in Israel and Ukraine where the EU stance towards human rights abuses was not taken long after the conflicts began. See, the statements of the Foreign Ministers made as the result of 330th Foreign Relations Council, Conclusions of 22 July 2014, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144098.pdf.

² For the sake of simplicity I shall use the term "European Union" or "EU" to refer both to the EU and what used to be the European Communities.

³ If we assume that the beginning of conscious creation of the EU external human rights policy is the time of Uganda crisis and the rejection of Spain's candidature to join the EU.

facts leaves out a fair number of substantive issues. Even if we focus on purely legal aspects of the EU actions in the external human rights policy field, there appears a series of questions that go well beyond factual considerations: Is the EU supposed to achieve a specific result, or is it about its best efforts? Which standards is the EU to abide by - the ones rooted in the international legal order, or the European Union ones? Is the EU expected to provide always harmonious, if not uniform, answers to the EU external human rights policy problems? Is the toolbox adequate to fulfil thus drafted mandate? If not, has the EU taken measures to both alleviate inadequacy of existing instruments and limit the risk that such inadequacy becomes visible? And finally, what are such expectations based on?

Attempts to answer such questions echo the need that the EU is bound to surpass the mentioned insufficiency and inadequacy: The EU is supposed to devote its best efforts in order to attain the best results. It is supposed to abide by the higher - internal - legal standards. The policy is to be coherent and comprehensive, and instruments at all times fully used. This utopian vision of the manner in which the policy is to function is very much rooted in two prevailing discourses of the EU law literature. Firstly, it refers to the constitutionalist analysis of the EU development - particularly vivid in the works of *inter alia*: Habermas⁴, Weiler⁵, von Bogdandy⁶. Secondly, it is based on the fact that the steady emancipation of the EU legal order from the international legal one has proven that the EU is apparently capable of surpassing the limits of the classical international setting and, with the use of its experimentalist methods, going beyond the conventional frameworks. These are the means through which the objectives of the EU are pursued that are of central importance for analysis of any policy. In Andrew Williams' analysis of the EU's institutional ethos it is where the law comes to play a central role:.

⁴ E. g.: Jürgen Habermas, 'A Political Constitution for a Pluralist Society?' [Blackwell Publishing Inc] 34 *Journal of Chinese Philosophy* 331, Jürgen Habermas, 'The European Nation-State and the Pressures of Globalization' *New Left Review* <<http://newleftreview.org/l/235/jurgen-habermas-the-european-nation-state-and-the-pressures-of-globalization>>, Jürgen Habermas, 'Why Europe Needs a Constitution' 11 *New Left Review*

⁵ E. g.: J. H. H. Weiler, 'A Constitution for Europe? Some Hard Choices' [Blackwell Publishers Ltd.] 40 *JCMS: Journal of Common Market Studies* 563, Joseph Weiler, *The constitution of Europe : "do the new clothes have an emperor?" and other essays on European integration* (Cambridge University Press 1999), more recently: J. H. H. Weiler, 'The political and legal culture of European integration: An exploratory essay' 9 *International Journal of Constitutional Law* 678.

⁶ I. a.: Armin von Bogdandy, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe' 3 *International Journal of Constitutional Law* 295.

'Merely through the EU's construction as a polity that attempts to impose order on the basis of espoused values or principles, an institutional ethos is created. We may not like its nature (assuming we can determine it) but we should not dismiss its presence and influence. Second, law occupies a hugely significant place within the construction of the institutional ethos.'⁷

Thus, as it seems, in part because of this institutional ethos the EU is expected to perform better when pursuing its external human rights policy objectives.

The above presented brief introduction permits us to formulate the first of the major questions posed at the outset of this study. The question **why** there is such a capability-expectations gap⁸ between what the EU is doing and what it is supposed to do will be addressed indirectly at all stages on the analysis. There are three hypotheses that are tightly connected with answering the question as to why the expectations gap emerged. They will also permit for better establishment of the steps that will be undertaken in the course of investigation for this study, and its ultimate objectives.

The Hypotheses

Firstly, we need to determine that for the purposes of this study human rights are treated as the objective to be attained by the EU in its external actions. Though some references will be made to content of human rights as a notion used in the EU legal framework⁹, this will be done in order to sketch a broader context for the analysis.

If we consider human rights as the 'object' of the policy (albeit of particular importance, yet a mere object), what matters are two issues. It is clear that the EU has developed quite an extensive toolbox that serves the purpose of the attainment of the EU external human rights objectives. We are interested, therefore, in (1) how these instruments are used and (2) which are the criteria used for such evaluation. The constitutionalist approach to the policy mentioned above hints at rule of law concerns that underlie both the practice of the EU and the critiques. Thus established framework for analysis of the EU external human rights policy does not seem to fully reflect the reality of the EU external human rights policy.

⁷ Andrew J. Williams, *The ethos of Europe : values, law and justice in the EU* (Cambridge University Press 2010), at 11.

⁸ Term which was used in reference to the CFSP: Christopher Hill, 'Capability-Expectations Gap, or conceptualising Europe's International Role' 31 *Journal of Common Market Studies*.

⁹ See: Chapter 3 below.

Yet, despite the prevailing criticism of the EU's practices, it seems that legal systems relevant for the discussion - the international and the EU one - do not permit the full reign of the rule of law. In other words, the EU, whilst pursuing its external human rights agenda on the international level, has arrived at the limits of its legal capacities. In this context it is true for both the more traditional environment of international law and international human rights law, as well as the EU's autonomous legal system. The pursuit of the external human rights objectives in line with the standards advocated by critics is simply not feasible within the prevailing legal frameworks not only for the EU, but, in fact, for any internationally acting entity.

The two hypotheses *per se* position the EU external human rights policy in the constitutional and legal framework inasmuch as the creation of instruments and, above all, their use is concerned. Yet, when one investigates further the said instruments, it seems that in their construction, even if they do not rigidly follow the rule of law principles, they accommodate other, numerous, notions.

This contestation has led me to put forward the third, and last, hypothesis. Given the active stance taken by the EU in relation to the development of the EU external human rights policy, one could venture the statement that the existing constitutionalist framework is insufficient. This hypothesis gives birth to a question that lies at the core of this study: which is the apt framework for analysis of a policy such as the EU external human rights one? The object of this third hypothesis places this study in the midst of doctrinal work dealing with the general inadequacy of tools used to describe and analyse the existing structures of power.

Objectives of the Investigation

The above described hypothesis indicate the objectives which are pursued in the course of this study, also with the view of clearly defining the value added of this work as compared to the existing literature in the field. The general goal of this investigation is add to the understanding whether the evaluation of the EU external human rights policy as it has been performed so far takes fully into consideration the characteristics of the instruments used in the area of EU external human rights policy. In particular, this study strives to attain three specific objectives. First, it attempts to uncover the paradigm, or underlying assumptions

that guide the authors in the field and the extent to which their postulates reflect theoretical elements of the policy and the manner through which it is realised. Secondly, the test of this framework ensues applying the elements of the identified theoretical framework in a conscious manner. The approach taken is to examine whether the specific features of the prevailing framework have been given due credit. The identification of concrete shortcomings and features which are not conventionally mentioned ensues. Finally, the attempt is made to broaden the theoretical approach by including additional benchmarks to the check-list thus re-constructing the framework and possibly placing it in the midst of alternative available theoretical models.

Hence, the gradual attainment of the above described particular objectives contributes to the fulfilment of the general goal of finding a more comprehensive framework of the analysis that can be applied not only to the EU external human rights policy, but other borderline (internal/external) policy fields and legal instruments that are employed therein.

The following sections offers the overview of the whole study posing the questions that underpinned the analysis in each of the three parts.

Step by Step Search for the Framework of EU External Human Rights Policy Evaluation

I. Part I: Introducing the Puzzle – the Perceptions of EU External Human Rights Policy, the Paradigm of Their Construction, and the Toolbox

The above outlined considerations have lead me to undertake the analysis of instruments of the EU human rights policy following the three steps that determined the structure of this study. The first part is of introductory character.

The literature review presented in Chapter 1 serves two purposes. It firstly outlines the problems that can be observed in relation to the EU external human rights policy – both its legal (constitutional basis, the capability of creating instruments, their actual elaboration) and application and execution components. Secondly, it sheds light on the underlying assumptions of the authors and the manner in which they fall within the currently prevailing strands of scholarship.

As the overview of doctrinal reception of the EU external human rights policy allows for a working categorisation of noted shortcomings. The emerging picture of the policy as seen by

the scholars is of an incoherent body of legal frameworks, instruments which are enforced on interest basis with disregard for the obligations they foresee for the EU. For the simplicity of discussions the various threads of criticisms have been identified as: (1) Human Rights as the component of the EU legal order; (2) Horizontal Incoherence (where the external-internal divide of the policy is addressed as well as the relationship between the human rights policy and other external relations' fields); (3) Vertical incoherence (referring to discrepancies in creation and application of instruments towards various 3rd countries and the Member States). Each of the aspects of incoherence corresponds to a lack of or inadequacy of actions and in substance points to an expected standard the EU is to abide by.

Given the above considerations the subsequent steps of the analysis involved the uncovering the conventional framework applied usually to the EU external human rights policy. Chapter 2, therefore, places the critiques in the midst of the most obvious theoretical framework - that of the rule of law. It identifies the common denominator benchmarks that can be found in almost all the theories of rule of law. These have been divided into three categories:

Rule of law principles concerning instruments/norms creation;

1. Non-arbitrariness, generality, prospectivity
2. Transparency
3. Clarity
4. Judicial Review

Rule of law principles concerning application of the created norms;

1. Equality
2. Judicial Review

Rule of law principles concerning conflict resolution

1. Accessibility
2. Enforceability of decisions

Having the benchmarks ready, Chapter 3 proceeds with presentation of the environment where the 'testing' is performed. It offers first the insight into the role human rights are to play in the constitutionalist context, and then proceed to the identification of the types of instruments that will be analysed from the point of view of the above criteria.

The three chapters included in Part I prepare the ground for the actual, concrete and detailed analysis that is performed subsequently within the second part of the study - the section where the fulfilment of Rule of Law criteria is traced in a systematic manner.

II. Part II: Instruments of EU External Policy Under the Rule of Law Scrutiny

The second part subsequently proceeds to analyse the various types of instruments against the principles that constitute the paradigm decrypted in Chapter 2. The purpose of the analysis is two-fold – firstly, to understand whether the principles of the paradigm when applied in systematic manner lead to the same conclusions as those outlined in the first part of the analysis. If this is not the case then, secondly, the systematic analysis will permit for identifying the instruments which do not follow the paradigm, yet have been developed by the EU and applied with a success.

The analysis of subsequent three chapters forming Part II will therefore follow the three sets of instruments devised by the European Union for the pursuit of the EU external human rights policy. The ‘instrumentarium’ making up the body of human rights policy in EU’s external action seems to be fairly straight forward.

The analysis is based on the EU Annual Report on Human Rights and Democracy in the World in 2012 which outlines the actions undertaken by the Union on the basis of the 2012 Action Plan and points to the instruments that were chosen as implementing measures.¹⁰ Amongst the actions, in part, in line with Alan Rosas’s¹¹ distinction, we should distinguish:

- Unilateral Measures that are adopted for internal purposes whose addressees are Member States and the EU institutions (guidelines and regulations implementing international standards);
- Unilateral Measures that are adopted for external purposes directed at third countries and civil society both within the EU and outside of it (financial instruments, trade measures, sanctions, diplomatic measures including those taken in order to act on the international forums);
- Bilateral and multilateral measures (chiefly international agreements but also regional policies instruments and human rights dialogues).

The subsequent three chapters proceed with the analysis of the three sets of instruments used in the EU external human rights policy applying the rule of law lens to their creation and implementation.

¹⁰ See Annex I for the detailed analysis which instruments fall within which category.

¹¹ Allan Rosas, ‘Is the EU a Human Rights Organisation?’ 11/2011 CLEER Working Paper, at 11.

The activity of the Court of Justice in this regard will be conducted separately pointing to its role with reference to instrument creation, application and conflict resolution. Accessibility and enforceability of decisions constitute probably the weakest of the three groups of criteria, structurally reflecting any traditionally conceived international law instruments.

III. Part III: Beyond the Rule of Law Paradigm

The third part builds on the conclusions of the second in determining where the prevailing paradigm does not reach (Chapter 7) and searches for alternative manner in which the EU external human rights policy could be analysed, understood (Chapter 8) and ultimately improved (Chapter 9).

Chapter 7 uses the policy cycle approach and the metaphor of the sieve in order to identify the notions that if analysed from the perspective of the Rule of Law paradigm are not given a due consideration. As such it works as an introduction to the subsequent chapters which offer an alternative theoretical framework, and finally, the set of benchmarks.

Chapter 8 of this study engages with trying to answer the question which trivially could be formulated as: 'if not the rule of law, then what?' The most obvious reference such framework would be the studies of governance. If constitutionalism gave birth to the rule of law ideal; governance should father the framework close to that of the rule of law. Obviously, governance and the sets of principles it advocates is as enigmatic as rule of law. This Chapter attempts at understanding what lies beyond the various theories of governance and whether they could be combined in a set of criteria subsequently used for policy evaluation purposes.

The initial definition of governance takes us in a straight line to the good governance principles' lists prolifically produced by international organisations. Yet, the closer scrutiny of these make it clear that these are little else than new clothes for the rule of law. Based on the rule of law, they incorporate Raz's 'thick' conception of the rule of law obscuring the possible value added of the procedurally inclined analysis. The search had to move back into the legal field – also because ultimately law needs to respond to growing governance pressure possibly through incorporating governance processes as the part of the legal procedure.

In the past ten years, lawyers made two meaningful attempts to conceive of governance theories in the manner which would use legal categories that go beyond good governance descriptive wish-lists.

Thus the principles underlying processes are the key to understanding of what could be expected of the European Union with reference to its external human rights instruments.

The new modes of governance seems to be offering the most straight forward – theory born on the ground of EU internal social policy with reference to the areas that require a ‘horizontal structure of authority’. Since every single state is responsible for human rights of its citizens, it seems new modes of governance could provide a response to many criticisms against the external human rights policy.

In the final chapter the broadened benchmarks are applied to the EU external human rights instruments. The outcome, though not perfect, is satisfactory. And whilst it takes us back to some of the basic criticisms the EU is addressed with, it opens also a field for new enquiry.

Before moving on to the first steps of the attempted analysis it is necessary to emphasize that this study constitutes a modest attempt to map out the theoretical labyrinth that informs current research on EU external human rights policy. Since the labyrinth is extremely complex and multi-dimensional, the analysis proposed provides for more of a skeleton for further research. Bridging the existing theories of international governing structures outlined the shifts in what is considered important with reference to the legal instruments. The law of external relations of the EU offers the best of the playgrounds to test the shifted paradigms and altered balances.

The intersection of legal frameworks and circumventing limits thereof have led to a situation in which procedures multiply parallel to law – if we follow the conventional theme of reasoning. If we, however, assume that they share the characteristics of law and because of functional connection could be considered as such, it provides the scholars and policy makers with opportunities to shift weight of their actions; possibly address problems at stake in a more direct manner (as in the EIHRD). If governance, therefore, is internal to law,

then it can be used to deepen the external human rights policy.¹² Yet in order to be able to do it, the gathering of know-how on the case-by-case basis is necessary.

Let us now have a closer look at the first of the possible case studies that constitutes the object of this analysis: the EU external human rights policy.

¹² See, for instance: Fabien Terpan, 'Soft Law in the European Union—The Changing Nature of EU Law' *European Law Journal* n/a.

Part I - Introducing the Puzzle – the Perceptions of the EU External Human Rights Policy, the Requested Paradigm of Its Construction, and the Toolbox

Part I constitutes a *de facto* methodological introduction to this study. It deals with **how** the human rights policy is analysed. In fact, it focuses on two aspects of the 'how' – namely, the meta-layer devoted by academic literature to the policy and the underlying assumptions that guide such writing - **the criteria of the analysis**. In other words, we shall start from examining the critiques uttered by various authors in the field in order to uncover the assumptions that underlie thus made conclusions. This first step will permit us to determine what benchmarks this paradigm consists of in order to apply them in a more disciplined manner to the relevant elements of the EU external human rights policy.

The second methodological step will involve the identification and presentation of relevant elements of the EU external human rights policy. In the spotlight, we shall position their procedural nature as it is the creation and, above all, application of the instruments that is more frequently criticised than the content of the policy itself, which, by its nature, is of rather generally accepted nature.

Chapter 1 - Literature Review: Prevalent Vices, Infrequent Virtues of the EU External Human Rights Policy

The opening scene of this study is devoted to presentation of critique of the EU external human rights policy area. Such overview should permit to identify elements of the critique, thus such an approach will allow us to reconstruct the standard against which the practice of the policy is evaluated. Whilst decrypting of that standard will be the focus of the subsequent chapter, this one will place emphasis on the critique itself, with the view of sketching the most profound background picture of the academic discussion. Whenever necessary, the image will be enriched with a relevant historical perspective, as many of the postulates were addressed in the course of the subsequent treaty reforms.

There is no doubt that the inclusion of human rights in the EU sphere of activity has been a painstaking, pragmatic and at the same time controversial process. Possibly, every single author working in the EU law area has addressed the issue, both in descriptive and normative terms. Yet, amongst the multitude of opinions, Andrew Williams remains the

chief reference point as far as a comprehensive overview of the EU external human rights policy is concerned. Whilst echoing the conclusions of many authors¹³, he summarizes the conventional discourse of the EU human rights area in the following terms:

'When the European Economic Community was established in 1957, human rights did not figure in the political or legal landscape constructed by the Treaty of Rome. Their presence was at best subliminal. The subsequent claim by the European Court of Justice, the Commission, the Council, and now all institutions of the EU that human rights were fundamental in the EU's creation is a myth.

The institutional practice and constitutional framework that has developed over past thirty or more years has, nonetheless, placed respect for human rights at the core of the EU's shared values. Not only is respect for human rights a prominent and explicit feature of the *values* now identified by the Lisbon Treaty of 2007, but it has also helped to frame an array of other implicit constitutional themes. From constructing the identity for the EU, legitimising its operations, providing a bulwark against extremism and the abuse of power, to acting as a spur to "closer union" between the peoples of Europe, human rights provide an iconic concept without respect for which the EU would lack moral and enduring substance. This remains true even with adoption of the Lisbon Treaty.¹⁴

Whether one agrees with the claim about the mythical or iconic character of human rights as underlying values or not, there is no doubt that human rights had to become a part of the European integration project. The result, as pointed out by de Búrca¹⁵, could have taken a different form, had the initial 1950s ambitious plans for the European Community been

¹³ *Inter alia*: Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals.' 27 Human Rights Quarterly 755 Philip Alston and Joseph Weiler, 'An 'ever closer union' in need of a human rights policy : the European Union and human rights' in Philip Alston (ed), *The EU and Human Rights* (Oxford University Press 1999), Tobias Gries and Ralf Alleweldt, *Human rights within the European Union* (BWV, Berliner Wissenschafts-Verlag 2004), G. De Búrca, 'The Evolution of EU Human Rights Law' in P. P. Craig and G. De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2011), G. De Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' 105 American Journal of International Law, Daniela Napoli, 'The European Union's Foreign Policy and Human Rights' in Nanette A. Neuwahl and Allan Rosas (eds), *The European Union and Human Rights* (Kluwer Law International 1995). Also, recognising the general difficulty in addressing human rights through external policy tools, see: United Nations. Office of Public Information., *Teaching human rights; a handbook for teachers* (2d edn, 1963) Alice Erh-Soon Tay and others, *Teaching human rights* (Australian Govt. Pub. Service 1981) at 45-55.

¹⁴ Williams, at 110.

¹⁵ De Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor'.

followed. Instead, the human rights policy of the European Union came about together with deepening and widening of the European project. Scholarly attention followed suit.

Yet, unlike the progressing European integration, the EU human rights policy has received a lukewarm feedback. Obviously, as time went by, human rights were attributed more and more prominent a place in the EU legal system. Yet, such progress did not suffice to accord the EU a title of a human rights actor or organisation neither internally, nor internationally.

Curiously, as the human rights policy developed, the criticisms directed at the EU have been elaborated, yet in their core they would remain concentrated around three areas. Firstly, they would refer to the mere presence of human rights in the EU legal order. This would raise questions as to the role of human rights in constructing the European Union; the EU's competence, and the interaction with the Member States. Secondly, the commentators would point to the horizontal incoherence in the policy creation and enforcement. In particular, the gap between the internal and external policy aspects would be emphasised as well as the manner in which human rights policy goals interact with other policy objectives (in the external relations context those would refer to trade and security concerns). Thirdly, the criticism would evolve around the issues of vertical incoherence – namely, how the EU would treat various third countries and the stance it would take towards its own Member States.

In the historical perspective, the academic discussion of the subject is fairly straightforward and emphasises the conventionality of the approach to the subject. The initially neglected human rights aspects of the economic cooperation could not be further ignored, especially once the Internal Market had been called into being. The issues faced by the EU institutions concerned initially internal matters – social and economic rights, consumer rights and further development of the non-discrimination principle necessary for the development and attainment of four fundamental freedoms. Furthermore, the perception of human rights as underlying values, somewhat written into the law and construction of the EU, required development of the concept and its clearer and more straightforward presence in the legal

framework of the European Union.¹⁶ And as a result, human rights issues did slowly soak into the Community actions.

Above all, it was the Court of Justice that focused its attention on the internal sphere of the Community law in the context of the debate on the supremacy of the EU law.¹⁷ Simultaneously, as a result of external events, human rights became present in the external sphere as well. The two aspects of the human rights policy have been presented as having almost a causal relationship – the external aspect was never to be successful without the sufficiently coherent internal approach. The voices confirming this statement abode: Member States of the EU, NGO's, third states and the academic community emphasised various negative aspects of the human rights policy of the EU, reminding that practicing what one preaches is essential.¹⁸

On 1 December 2009, the Treaty of Lisbon finally came to force after years of negotiations, insecurity and questions as to the nature, ethical, moral and philosophical foundations, and

¹⁶ For more see: A. Sen, 'Elements of a theory of human rights' 32 *Philos Public Aff* 315 and Williams Williams suggests a working definition of an 'institutional ethos' which is to characterise the European Union – it 'should mean a collective disposition, character and fundamental values that capture the existence of the EU as an institution in terms of both its particular formally constructed arrangement and its general pattern of activity. (...) In other words, it is the EU's underlying and continuing ethical genius', *idem* at 11.

¹⁷ *CJEU, Case C-26/69 Stauder v City of Ulm* [1969] ECR 419 *CJEU, Case C-4/73 Nold v Commission* [1974] ECR 491.

¹⁸ See *inter alia*: for summary: Philip Alston, Mara R. Bustelo and James Heenan, *The EU and human rights* (Oxford University Press 1999), Paivi Leino-Sandberg, *Universality as Particularity - the Politics of Human Rights in the European Union* (The Erik Castrén Institute Research Reports 2005) P. Craig and G. De Búrca, *EU Law, Text, Cases and Materials* (Fourth edn, Oxford University Press 2008), Chapter 10; for particular criticisms: Claudio Corradetti, *Human rights in Europe : theory and practice* (XL 2006), Kirsten Lampe, *Human rights in the context of EU foreign policy and enlargement* (1. Aufl. edn, Nomos 2007) Henry J. Steiner, Philip Alston and Ryan Goodman, *International human rights in context : law, politics, morals : text and materials / Henry J. Steiner, Philip Alston, Ryan Goodman* (3rd edn, Oxford University Press 2008) Anneli Albi, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums' 15 *European Law Journal* De Búrca, 'The Evolution of EU Human Rights Law', Andrew J. Williams, *EU human rights policies : a study in irony* (Oxford University Press. 2004) A. von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' 37 *Common Market Law Review* 1307; Christian Tomuschat, *Human rights : between idealism and realism* (Oxford University Press 2003); for NGOs on Human Rights in the EU see: Amnesty International, 'Amnesty International Report 2010: The State of the World's Human Rights' <http://www.amnesty.eu/static/documents/2010/Annual_Report_2010%5B1%5D.pdf> , p. 65; Human Rights Watch, 'World Report 2011' <<http://www.hrw.org/en/reports/2011/01/24/world-report-2011>> ; Amnesty International, 'The EU and Human Rights - Making the Impact on People Count' (*Amnesty International Secretariat*, 2009) <<http://www.amnesty.org/en/library/asset/IOR61/004/2009/en/64787ed1-83dd-49dd-bd27-c96e773f5ec1/ior610042009eng.pdf>> ; The 12th EU NGO Forum on Human Rights, 'Recommendations of the Forum on "EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward"' (*European Commission*, 12 and 13 July 2010) <<http://www.humanrightsgoforum.eu/Recommendations.pdf>> accessed 28 February 2011; etc.

the future of the creation named the European Union. The character of this construct, its role in the world and its ability to pursue the wide array of objectives had been a subject of the public, political and legal debate for more than ten years.¹⁹ These arrangements determined also the scope of the reform. As a result, the new reform treaty consists of an array of improvements to the structure of the Union, making its management easier in the changed architecture of the 28 Member States. It includes also a response to long voiced criticisms against the scope, modes and measures of various policies pursued by the European Union. This Treaty – somewhat an achievement of the human rights policy *per se* – is the focus and the background of the analysis pursued in the subsequent chapters.

Whilst the first set of criticisms concerning the mere fact that the Union had to deal with human rights concerns has received a consistent legal response in subsequent Treaties, starting off with the Treaty of Maastricht, the Lisbon reform seems to be responding to coherence pressure. It strengthened the internal dimension of human rights policies²⁰ thus legitimising the external dimension. The Treaty, therefore, provides the direct response to Philip Alston's and Joseph J. H. H. Weiler's et al most comprehensive set of postulates. The memorable report *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights* which was adapted from the report of the Comité de Sages responsible for 'Leading by Example – A Human Rights Agenda for the European Union for

¹⁹ In fact the origins of the debate on the shape of the European Union can be traced back to the 1995 Cannes European Council which, in the light of the perspective of enlargement pointed to the need for the institutional and constitutional reform of the European Union and the European Community. The pressing need for enhanced and efficient not only political cooperation which appeared after the 11 September 2001 World Trade Centre and subsequent Madrid attacks lead to a situation in which in order to efficiently create the Area of Freedom, Security and Justice which was to ensure the undisturbed functioning of the internal market made the subsequent reform inevitable. What was needed to be agreed upon was the shape of this reform which until the last minutes had remained controversial.

Furthermore, the coined 'uniformity in diversity' required the fresh comprehensive approach that would transform the European project into more than political reality – it was to be the project of peoples – not only institutions and states. In order to achieve this, as Williams claims with reference to ethos of Europe, the common set of values was needed capable of enrapturing the Europeans. 'A wholesale constitutional review, as it might appear in retrospect, began in an attempt to make sense of the evolving EU without losing sight of its origins and history'. Therefore, '(t)he absence of an 'ethos' (...) appears as a prevalent and crucial criticism. People simply do not know what the EU stands for'. Williams, *The ethos of Europe : values, law and justice in the EU*, at 6, 7, and 9.

²⁰ Amongst others, by elevating the Charter of Fundamental Rights to the status of the treaties and by creating an obligation for the Union to join the European Convention for Human Rights.

the Year 2000' has summarised everything that could be said about the EU human rights policy at the end of the 1990s²¹ and proposed a roadmap for its improvement.

This brief historical de-tour permits us to view the critiques that will be analysed in depth in the following sections somewhat as the settled, conventional view of looking at the EU external human rights policy. The manner in which the area is treated has been established with the mentioned pioneer report by Alston and Weiler drafted approximately 15 years ago. The analysis has been deepened in those years, fitting, however, the set of criticisms that have remained intact. And so, even though Alston and Weiler admitted that the external human rights policy of the Union presents itself better than the internal one, they have pointed to the lack of its apparent fully-fledged policy features and the obvious reluctance to undertake the leadership position despite rhetorical claims of universality and indivisibility of human rights.²² They, therefore, made a connection between comprehensiveness of the EU approach and the ultimate effectiveness of the EU external human rights policy. Above all, they referred to double standards – those on internal-external axis - inherent for the policy which by no means resembles the postulated two sides of the same coin, and those characteristic for bargaining and diplomatic dealings with various states that ultimately are not treated in an equal manner.

The problem is similarly treated by Williams, who in his emblematic 'Study in Irony'²³ identified the reasons for institutions' structural ability to avoid coherent enforcement of the mainly rhetorical human rights claims. The discussion of conditionality and its use reveals the latter form of double standards – the one which refers to third countries which depending on their political and economic power are treated differently. Whoever has taken human rights clauses as the focus of their attention, emphasizes the discrepancies in treatment of various states. It is enough to refer to the work of Lorand Bartels, Elena Fierro and Mielle Bulterman.²⁴

²¹ Alston and Weiler.

²² Ibid, at 7 – 8.

²³ Williams, *EU human rights policies : a study in irony*, op. cit.

²⁴ Lorand Bartels, *Human rights conditionality in the EU's international agreements* (Oxford University Press 2005), Elena Fierro Sedano, *The EU's approach to human rights conditionality in practice* (M. Nijhoff 2003), Mielle Bulterman, *Human rights in the Treaty Relations of the European Community : real virtues or virtual reality?* (Intersentia; Hart 2001).

The conventionality of the approaches thus presented against the fairly dynamic development of the EU makes one question the assumptions behind the criticisms and the policy. As it can be inferred from the scholarly writings and the legal responses anchored in the Treaties, the 'normative power', exportation of values and standard setting is the appropriate way of conducting external relations by the EU (or for that matter foreign policy of any state). Bridging the gap between the internal and external policy field corresponds to the image of the EU acting externally as if it were a State dealing with internal human rights abuses. In this context all states – third countries and the Member States of the EU – are to be equal before the law. The implications of the above mentioned statements are pretty meaningful both from the perspective of the architecture of the policy and its possible venues of development. The following sections will attempt at presenting a more detailed analysis of the three groups of criticisms in order to place under the spotlight the conventional aspects thereof.

I. Human Rights as a Component of EU Legal System and EU External Policy

The first of criticisms of the EU foreign human rights policy can be gathered from the repetitive questioning whether the EU should and can deal with human rights concerns.²⁵ It is construed against the classical tale of 1957 Communities which had no human rights objective in their constitutive documents. Many changes have taken place since the beginnings of the European project, yet human rights as a component of EU legal system and the EU external policy continue to be questioned. Can the Union be perceived as a sort of human rights organization?²⁶

This consideration is comprised of the vast set of questions reflecting the inherent interplay between the internal and external aspects of the policy. Firstly, given the lack of explicit provisions regulating the human rights competence, could the EU undertake actions in this area of human rights? Secondly, what is the role human rights play in the EU legal system? And what purpose is to be achieved through their integration? Thirdly, which is the relevance of the type of competence attributed to the EU in the area? Finally, and most importantly for our purposes, how does this affect the EU external policy? Could the EU be perceived as the enforcer of human rights beyond its borders? All of the outlined questions refer at their core to two issues – the legal/constitutional basis for the action in the human rights policy on the one hand, and the construction of EU's identity externally.

The attempts to answer these questions can be traced back even to 1960s when the European Court of Justice started referring to human rights in its case law. Yet the most

²⁵ It is interesting to note, the reverse logic in the inclusion of human rights concerns in the WTO regime. There, trade is supposed not to obstruct the achievement of other policy objectives. Respect for human rights, therefore, is used as safety vault for the over-arching goal of world trade liberalization. This is the purpose of the organization and the core constitutional principle of the organization. Nevertheless, human rights concerns do soak into the system and there are more and more tools which are used for human rights purposes (General Exceptions of Articles XX and XXI GATT, accession, non-application, waivers, dispute settlement, trade policy reviews etc.) for review of all those measures – see: Susan Aaronson, 'Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO' *World Trade Review*, Vol 6, No 3, pp 413-449, 2007. Nevertheless, the objective of the organization remains clear – it is trade that is at the forefront despite the calls from academia to provide a more prominent position for human rights: Ernst-Ulrich Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' 13 *European Journal of International Law*, Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' 13 *European Journal of International Law* 815, Nicola Jägers, 'The World Trade Organization and Human Rights: The Role of Principles of Good Governance' Available at SSRN 1844305 Sarah Joseph, *Blame it on the WTO?: a human rights critique* (Oxford University Press 2011).

²⁶ See for instance: Bogdandy, op. cit.

dense discussion started after the adoption of the Single European Act of 1986 and against the background of the collapse of the Berlin Wall. From this moment onwards the European Community could no longer be a purely market oriented structure – it had to emphasize values it stood for, if it was to produce a successful response to the changed geo-political situation in Europe. Suddenly, in order to emphasize its uniqueness, but also to protect its integrity, it had to procure a quasi-identity based on the Western approach to state – it was to be based on values of democracy, rule of law, and respect for human rights. The scepticism as to the Community's capacity of accomplishing this goal is visible in the Cassese's, Clapham's and Weiler's study of 1991 in which they turn to the Member States calling for them to adopt a Human Rights Action Plan.²⁷ There the authors emphasized the potential of human rights to control the supra-national organization which has already been gaining power.²⁸ The call for the adoption of the European Union (or Community at the time) bill of rights and accession to the ECHR were the means through which the realisation of the human rights policy of the European Community should take place.²⁹ The explicit opinion of the European Court of Justice about Union's lack of the general competence in the human rights issues and its consequential inability to join the ECHR confirmed the implied deficiency of the EU construct.³⁰ Von Bogdandy in 2000 looked to whether the EU could become a human rights organization in the view of the discussions of the proposed Charter for Fundamental Rights and gives the positive answer conditioned upon making an EU human rights policy one of the core policies of the Union and de facto emphasizing its importance

²⁷ Andrew Clapham, Antonio Cassese and Joseph Weiler, *European union, the Human Rights Challenge / V.I Human Rights and the European Community: a critical overview/ Andrew Clapham.*-ISBN 3-7890-2280-2 V.II *Human Rights and the European Community: methods of protection/ Antonio Cassese, Andrew Clapham, Joseph Weiler, editores Human Rights and the European Community: the substantive law/ Antonio Cassese, Andrew Clapham, Joseph Weiler, eds.*-ISBN 3-7890-2282-9 (Nomos 1991), see, especially: Antonio Cassese, Andrew Clapham, Joseph Weiler, 1992 – What are our Rights? Agenda for a Human Rights Action Plan, at 1 – 75. See also the earlier publication: Lammy Betten, 'The incorporation of fundamental rights in the legal order of the European Communities : with special reference to the right to strike' (Utrecht, Rijksuniversiteit, diss, 1985, Asser Institut, 1985).

²⁸ See also: Bogdandy, at 1308 and: Frédéric Sudre and Sabrina Quellien, *Droit communautaire des droits fondamentaux : recueil de décisions de la Cour de justice des Communautés européennes* (Bruylant 1999).

²⁹ Clapham, Cassese and Weiler, see, especially: Antonio Cassese, Andrew Clapham, Joseph Weiler, 1992 – What are our Rights? Agenda for a Human Rights Action Plan, at 1 – 75. See also the earlier publication: Betten op. cit.

³⁰ *CJEU, Opinion 2/94 on Accession by the Community to the ECHR* [1996] ECR I-1759, see also: Juliane Kokott and Frank Hoffmeister, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' 90 *The American Journal of International Law* 664.

amongst other policies of the EU.³¹ Rosas, more than ten years provides a negative answer emphasising what may be called as holistic character of the European Union.³²

1. From No Provisions on Human Rights to Treaty of Lisbon

The above quoted excerpt from Williams' *Study in Irony* is just a sample of the usual account about the history of the European human rights policy.³³ The tale follows the usual pattern: from the nothingness of the Founding Treaties emerged a need to address the human rights concerns. Internally the need was a by-product of expanding Union; externally the need was dictated by the changing geo-political architecture of the world. In internal sphere this need was replied to by the Court of Justice³⁴; in international dealings other institutions needed to act in order to patch the loophole in the legal system of the EU potentially destructible for its reputation.

Indeed, it was the said nothingness that initially was pointed to and defended – the Communities as the product of the far-fetched political compromise needed to retain their economic character. Human rights were rejected as the field of action and the European construct was too young to constitutionally address the issue. The Court of Justice, however,

³¹ Such formulation of criticisms against the EU policy can be encountered in Alston, Bustelo and Heenan as well as recent publications of Grainné de Búrca: De Búrca, 'The Evolution of EU Human Rights Law', op. cit. The echoes of the discussion can be traced in the recent publications concerning the *Kadi* case, see, for instance: Samantha Besson, 'European Legal Pluralism after Kadi' 5 European Constitutional Law Review 237 Conor Gearty, *Situating international human rights law in an age of counter-terrorism* (Hart Publishing 2012) Joris Larik, 'Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment' Yearbook of Polish European Studies 149 N Türküler Isiksel, 'Fundamental rights in the EU after Kadi and Al Barakaat' 16 European Law Journal 551 Stefan Griller, 'International law, human rights and the European Community's autonomous legal order: notes on the European Court of Justice decision in Kadi' 4 Eur Const Law Rev 528 Isiksel, the status of the Charter of Fundamental Rights and the ongoing process of the EU's accession to the ECHR as well as the developed nexuses. Bogdandy Jean Paul Jacque, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' 48 Common Market Law Review 995.

³² Rosas, 'Is the EU a Human Rights Organisation?' op. cit.

³³ Manfred A. Daus, 'The Protection of Fundamental Rights in the Community Legal Order' 10 European Law Review Pierre Pescatore, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' 2 Human Rights Law Journal, Ulrich Scheuner, 'Fundamental Rights in European Community Law and National Constitutional Law' 12 Common Market Law Review, Allan Rosas, 'Fundamental Rights in the EU, with Special Emphasis on the Role of the European Court of Justice' in Gudmundur; Grimheden Alfredsson, Jonas; Ramcharan, Bertrand G.; de Zayas, Alfred (ed), *International Human Rights Monitoring Mechanisms* (2009) Samantha Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution' 6 Human Rights Law Review.

³⁴ For the detailed account of the Court of Justice action, see especially: Rosas, 'Fundamental Rights in the EU, with Special Emphasis on the Role of the European Court of Justice' Besson, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution', op. cit.

was free to act, hence judgements in cases *Nold*³⁵ and *Stauder*³⁶ date back to late 1960s and early 1970s. The Council and the Commission similarly had to face the human rights emergency at the time of Ugandan dictator Idi Amin.³⁷ In both cases the actions lack formal legal basis which is not paramount to the actions being illegal. The Court explores the traditions common to Member States as potential source for a quasi-legal basis, and the institutions place their response in the context of international and human rights law. The inability to act legally³⁸ in the face of human rights abusive events made it clear that there is a need for the more explicit reference to be placed in constitutive documents of the EU.

The first appearance of human rights in the treaty language followed a series of political documents and the 1986 Single European Act preamble. The Treaty of Maastricht referred already to 'the respect of fundamental rights as guaranteed by the European Convention for the Protection for Human Rights and Fundamental Freedoms and as they result from constitutional traditions common to the Member States' (Article F(2)) which are treated as general principles of Community law. Subsequently the references to human rights are made in provisions concerning development cooperation ('Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'). In this area the obligation was placed on the Community to take account of objectives approved in the context of the UN and other "competent" international organisations. Similarly, one of the objectives of the CFSP (Article J.1) focused on the Union and its Member States acting for ensuring highest security levels for themselves but also worldwide whilst developing and consolidating 'democracy and the rule of law, and respect for human rights and fundamental freedoms'. Likewise, the fundamental rights obligations have been present in the cooperation in the areas of Justice and Home Affairs (Article K) and therefore whenever the external dimension of this conglomerate of policies is concerned. Thus outlined foundations for human rights have been maintained through the subsequent treaty versions. The

³⁵ CJEU, Case C-4/73 *Nold v Commission*, op. cit.

³⁶ CJEU, Case C-26/69 *Stauder v City of Ulm*, op. cit.

³⁷ In 1979 when massacres occurred the European Community found itself in a problematic position as it lacked the legal basis for suspending the aid granted to Uganda – a party to the Lomé III Convention and beneficiary of STABEX aid. The beginnings of the external human rights policy were antecedent to those of internal one. See: Napoli, op. cit.

³⁸ Perhaps it would be more correct to refer to the inability to base the actions on a concrete legal basis, which is the most demanding threshold for legality of action from an internal EU perspective.

elaboration thereof has not, however, been satisfactory – one could not claim that the EU has a full-fledged system of human rights protection, nor could it make use of the existing system of the European Convention of Human Rights³⁹. As the result, the role of the European Court of Justice has increased due to the fact that it needed to guard two sets of ‘gentlemen’s agreements’. First group was that with the national constitutional courts that following the Bundesverfassungsgericht adopted the *So-lange* doctrine⁴⁰; the second one was that with the European Court of Human Rights following the *Bosphorus* judgement⁴¹.

The evolution of the legal basis for the human rights internal action has taken place parallelly. One should note the difference in terms⁴² – internally defined "fundamental rights" have been given as off the outset the status of "domesticated" and therefore well developed concepts. They have been linked to the European Convention for Human Rights and derived from the constitutions of the Member States. Their presence is therefore justified in the internal sphere of the Community and Union action. "Human rights", on the other hand, have remained conceptually outside to the legal system of the Union and Community. There is no coincidence in the fact that the references are kept by Treaty-makers separate. In fact, Rosas observes that this approach reflects the constitutional approach the EU has taken towards human rights in its internal dealings:

‘The emphasis on the notion of fundamental rights when EU law and EU internal developments are at stake suggests a constitutional rather than international approach. The EU legal order is a constitutional order which now, with the Charter of Fundamental Rights, is endowed with its own Bill of Rights, much in the same way as States have constitutions and constitutional rights catalogues.’⁴³

³⁹ CJEU, *Opinion 2/94 on Accession by the Community to the ECHR*, op. cit.

⁴⁰ The *Solange* doctrine evolved substantively throughout the years. The *Solange I*, BVerfGE 37, 271 2 BvL 52/71 of 29 May 1974; was followed and modified by *Solange II*, BVerfGE 73, 339 2 BvR 197/83 of 22 October 1986. Similarly, the *Solange* approach was fine-tuned in the series of EU relevant judgments starting with: *Maastricht-Urteil*, BVerfGE 89, 155 of 12 October 1993; *Banana*, BVerfGE, 2 BvL 1/97 of 7 June 2000; *European Arrest Warrant*, BVerfGE, 2 BvR 2236/04 of 18 July 2005; *Lisabon-Urteil*, 2 BvE 2/2008 of 30 June 2009, up to the recent *Honeywell*, BVerfGE, 2 BvR 2661/06, decision of 6 July 2010.

⁴¹ *Bosphorus Hava Yollari Turizm v. Ireland*, App. No. 45036/98 (Eur. Ct. H. R. 30 June 2005).

⁴² Williams notes similarly: 'Tension is, nevertheless, apparent between the 'human' and 'fundamental' labels that are used. Why the distinction? Does it suggest a difference in substance? On a superficial level the term 'fundamental' appears reserved for internal consumption. The 'human' epithet attaches more readily to the external. Most commentators have found it easier, however, to suggest that the two terms are interchangeable, providing us with no residual legal or philosophical problems. It is probably best to accede to this line of reasoning. The difference may only be a reflection of loose drafting based on equally vague jurisprudence. But the suspicion remains that there is intended to be a distinction. It is just not clear what that might be.' Williams, *The ethos of Europe : values, law and justice in the EU*, at 112.

⁴³ Rosas, 'Is the EU a Human Rights Organisation?', op. cit. at 7.

It is true that the Treaty of Lisbon provides of constitutional solutions for the human rights policy. Firstly, it provides the basis for the accession of the European Union to the European Convention of Human Rights (Article 6(2) TEU)⁴⁴ with the clear intent of limiting the review of its application only to the acts of the Union origin.⁴⁵ Secondly, it grants the status of the Treaty to the European Charter for Fundamental Rights which, similarly to the Convention, is addressed to 'the institutions, bodies, offices and agencies of the Union (...) and to the Member States only when they are implementing Union law'.⁴⁶ Thirdly, and most importantly, the Union is equipped with general objectives concerning human rights enshrined in Article 3 TEU:

'1. The Union's aim is to promote peace, its values and the well-being of its peoples.

(...)

3. The Union (...) shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

(...)

5. In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'

The above outlined developments have possibly marked the end of the 'dramatic' inability on the part of the EU to act, but still retained the question about the character of the

⁴⁴ See: Article 6.

⁴⁵ See: Article 1(b) of the Protocol No 8 Relating to Article 6(2) of the Treaty on European Union on the Accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms. The Article refers to the accession agreement which is to include provisions 'for preserving the specific characteristics of the Union and Union law' for the Union's participation in the control bodies of the Convention (Article 1(a)) and establishing mechanisms 'necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate'. It is obvious that the main concern of the drafters of the Treaty was to limit the number of applications, filed against the European Union (which, practically speaking, could be the matter of convenience as well). It is true that, at the same time, applications against parties to the Convention (therefore potentially between the Member States and the European Union) provided for by its Article 33 are filed extremely infrequently. According to the Court's statistics they amount to as few as sixteen and, therefore, supposedly, do not seem to be capable of burdening the system. See: European Court of Human Rights, *Inter-State applications*: http://www.echr.coe.int/NR/rdonlyres/5D5BA416-1FE0-4414-95A1-AD6C1D77CB90/0/Requ%C3%AAtes_inter%C3%A9tatiqes_EN.pdf

⁴⁶ Article 51 of the Charter of Fundamental Rights of the European Union.

competence the EU has in the field of human rights. Does the EU finally have the general competence as argued by White?⁴⁷ Or is it still the limited one, that needs to be reconfirmed through the specific provisions of the Treaty as summarized by de Búrca in the context of internal policy?⁴⁸

The obligation to promote internally and promote and uphold externally Union values seems to be equipping the Union with legal basis to undertake human rights related actions. This is, to an extent, confirmed by Article 51 of the Charter of Fundamental Rights. The Charter is addressed to institutions, bodies, offices and agencies of the Union and the Member States only when they are implementing Union law. They are to 'respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties'. At the same time the invocation of the principle of subsidiarity and the limitation of Charter's application gives an impression that there are areas where the Union cannot undertake human rights actions. Definitely, the decision as to whether there exists a general human rights competence of the Union in internal matters is very much connected to the scope of the application of the Charter. It will be, therefore, up to the Court of Justice (yet again) to provide with an ultimate answer. The first steps have been taken through the judgments in *McB*⁴⁹, *Akerberg Fransson*⁵⁰, *Melloni*⁵¹ and others, yet none of those provide the definite answer.

In the area of external relations, human rights competence seems to be of general character, yet it is not accompanied by the equally general system of remedies. Article 275 TFEU establishes the competence of the Court of Justice to adjudicate in the area of the Common Foreign and Security Policy only in case of restrictive measures adopted against legal and private persons. The remainder of the actions of the EU are governed by Article 3(5) TEU and Article 21 TEU. As it seems, at least inasmuch the Treaty formulation is concerned the EU has migrated far from the nothingness of the 1957 Community Treaties, yet has not arrived yet

⁴⁷ Robin CA White, 'A New Era for Human Rights in the European Union' 30 Yearbook of European Law.

⁴⁸ P. P. Craig and G. De Búrca, *The evolution of EU law* (2nd edn, Oxford University Press 2011), at 492.

⁴⁹ *CJEU, Case C-400/10 PPU - McB* [2010] ECR p I-8965

⁵⁰ *CJEU, Case C-617/10 - Åkerberg Fransson* [2013] ECR I-0000, nyr

⁵¹ *CJEU, Case C-399/11 Melloni* [2013] ECR I-0000, nyr.

at the full human rights capacity guaranteed by its constitutional documents. It remains to be seen whether and when such capacity will be attained.

2. The Purpose and Function of Human Rights – the Construction of EU Identity

The inclusion of human rights concerns in the constitutive documents of the European Union though in itself an act of extreme importance was also prone to criticism. For it is clear that this act in addition to providing necessary support to the Court, and other institutions to undertake necessary steps, had a symbolic meaning.

Firstly, there was obviously the positioning of the European Union in the midst of the civilised and taking on the vernacular of rights. Quoting after Gráinne de Búrca 'international status of human rights had become such that no state and no developed political entity, especially not such an ambitious emerging supra-national order could afford to eschew its language or its values'.⁵²

Secondly, there was the positioning of the EU *vice versa* its own peoples. The deepening and widening of the European project came hand in hand with elaboration of European identity. The EU had to legitimise itself and took on the robes of the heir to European collected traditions.⁵³

Thirdly, the EU has painted itself as the model to follow and indeed with the Treaty of Lisbon leading by example for the purpose of achieving peace and stability worldwide is a binding obligation. In the words of Blockmans, Van Vooren, and Wouters:

⁵² Gráinne de Búrca, 'The language of rights and European integration' in Josephine Shaw and Gillian More (eds), *New legal dynamics of European Union* (Clarendon Press 1995).

⁵³ See the Preamble to the Treaty of Lisbon in the Lisbon version:

'(...) RESOLVED to mark a new stage in the process of European integration undertaken with the establishment of the European Communities,
DRAWING INSPIRATION from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law,
RECALLING the historic importance of the ending of the division of the European continent and the need to create firm bases for the construction of the future Europe, (...)'

'This role for the Union whereby it 'stabilizes' the world and 'points the way ahead' is not merely a moral imperative proclaimed by its political leaders, but has found its way into EU primary law as a legally binding obligation.'⁵⁴

Taking on the vernacular of human rights and strengthening internal fundamental rights is supposed to ultimately legitimise the EU's actions worldwide and make the EU's normative appeal stronger.

What is disputed here apart from non-idealistic and instrumental treatment of human rights is the extent to which such legitimisation can take place – to what extent it makes EU's actions credible. However, there appear two problems with such legitimisation – the first one is well outlined by Andrew Williams and echoes the legitimisation model developed by Kinzelbach, Kozma and Suchman⁵⁵. The second of the problems emphasised by the academics goes back to the nature of human rights – their universalism and Western origins.

For the purpose of analysing the legitimising quality of human rights, Williams coined the term 'authentication'.⁵⁶ It is a preceding legitimisation test for a polity such as the EU which is placed outside of the familiar international organization patterns. He elaborated that the process of authentication involves the three-fold discourse:

'First the Community needed to represent itself as an authentic institutional site of governance so as to authorize the making of decisions and laws that were to bind the Member States and their citizens and to intrude politically and legally in their lives. Secondly, the Community had to justify its claim to represent its constituency beyond its borders. And thirdly, the Community had to authenticate its right as a "locale" of power internally and externally.'⁵⁷

In the international sphere, the process of authentication, according to Williams, involved the development of the international human rights discourse under the auspices of the United Nations manifested through the adoption of the Universal Declaration of Human Rights and subsequent human rights instruments. The word 'discourse' emphasizes the rhetorical dimension of this process which lead to the establishment of the moral code against which any polity functioning in the realm of international relations and law could be

⁵⁴ Bart Van Vooren, Steven Blockmans and Jan Wouters, *The EU's role in global governance the legal dimension* (1st edn, Oxford University Press, 2013), Introduction.

⁵⁵ Katrin Kinzelbach and Julia Kozma Kozma, 'Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights' 10 *Perspectives on European Politics and Society* 17.

⁵⁶ Williams, *EU human rights policies : a study in irony* at 135.

⁵⁷ *Ibid* at 135.

judged, without necessarily ensuring its practical application. Hence, there is no surprise that the European Community when pupating into the European Union reached out for the ethos that came with the language of international human rights in order to 'authenticate' its credibility. At the same time, the European Union needed to 'authenticate' its actions from the regional, European perspective – here the predominant role that the European Convention for Human Rights has played puts itself in the forefront.

Williams points to the issue of competence and the role of the European Court of Justice in this process which consequently lead to the establishment of the 'new legal order' with constitutional pretence. It was thus the European Court of Justice that, starting from the initial void in the area of human rights has commenced the narrative of the authentication of human rights in the internal institutional discourse of the EU – the narrative which, being in part retrospective linked the 'positive and inspiring humanitarian aspects of the European past and the aims of the Community in its moves towards Union'.⁵⁸ The narrative developed by the Court seeks legitimization of the Union policies whenever the actions of the Union intersect with the area of human rights in the internal dimension and starts with the significant silence. Human rights were not supposed to be a part of the European project, yet they proved instrumental to the development of the European 'actorness' and its international position, especially with the European Community first, and subsequently the Union striving to develop relations with third countries, and especially with its former colonies. This very delicate relationships required additional efforts which would authenticate the activities of the EU not only in the eyes of its collaboration partners, but also for the international community. The developing relations with the ACP states have been fundamental in this respect. Therefore external legitimisation process had to move forward regardless of treaty and legislation development in this area.⁵⁹

Williams, therefore, apart from providing the EU's human rights policy development with a conceptual context, explained the discrepancy between the internal and external policy fields. This reasoning is parallel to that proposed by Kinzelbach and Kozma⁶⁰. Their

⁵⁸ Ibid, at 158.

⁵⁹ Note that the first human rights clause appeared in 1976, way before the Single European Act and Treaty of Maastricht.

⁶⁰ Kinzelbach and Kozma, op. cit.

terminology followed classification of Suchman⁶¹ who referred to Williams's authentication as to a normative legitimisation process. Suchman⁶² for the purposes of the theory of organisation uses a broad definition of legitimacy:

'Legitimacy is a generalized perception or assumption that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions'

The 'socially constructed system of norms, values, beliefs and definitions' in which the European Union as an organisation functions had been shaped since the World War II under the premises of the United Nations Organisation and involved pre-acceptance of the internationally recognised standards reflecting humanist traditions of the allies (victors) – the 1948 Universal Declaration of Human Rights has been therefore the basic reference point for any subject of international law. Regionally, as it was mentioned before, this commitment has been reinforced through the Council of Europe and its chief instrument – the 1950 European Convention of Human Rights and Fundamental Freedoms.

⁶¹ Mark C. Suchman, 'Managing Legitimacy: Strategic and Institutional Approaches' 20 The Academy of Management Review 40.

⁶² Suchman in his review of literature focuses on the theory of organisation as developed by management theorists. In broad theoretical framework he takes two approaches to legitimacy (strategic and institutional) and focuses on legitimacy as a relationship between an organisation and an 'audience'. According to his explanation 'strategic' legitimacy is an outward looking process in which the managers use legitimacy as an operational resource – they extract it from the environment in which they function and use it in order to achieve goals of an organisation. Institutional legitimacy, on the other hand refers to how the environment (and hence culture) determines the manner in which an organisation is built, how it is run, and how it is understood and evaluated. Ibid, at 575-576. He chooses the mid-way and develops further dimensions of legitimacy under the term 'organisational legitimacy' – pragmatic legitimacy (legitimacy corresponding to most immediate constituencies), 'moral legitimacy' (reflecting a positive normative evaluation of the organisation and its activities which does not mean that an organisation is to be ultimately 'interest free') and 'cognitive legitimacy' (acceptance of an organisation as necessary or inevitable on the basis of some taken-for-granted cultural account). The links between various types of legitimacy depend to a big extent on the organisation at stake, its position and whether it wishes to gain legitimacy, maintain it or restore it.

When applying management theorists approach to the internal and external dimensions of legitimacy of the European Union, one can easily detect the linkages between various dimensions thereof. Hence, pragmatic legitimacy will be visible mainly in the internal discourse of the EU. The most immediate audience of the EU as an organisation consists of, firstly and foremostly, of citizens of the EU Member States, and these have been the entities which criticised the EU for its democratic deficit which was supposedly to be at the core of the European project. Following Suchman's theory – 'constituents are likely to accord legitimacy to those organisations that have "our best interests at heart", that "share our values"'. From the perspective of the hindsight – this is exactly how the EU has been developing as an organisation and its powers – it has been apparently based on shared values – respect for human rights, democracy and rule of law and was there to make the lives of citizens of the Member States of the EU much easier. Cognitive legitimacy has been used ever since the apparent success of the internal market – there is no other way for the old continent to maintain its standards and face the competition from the rising Asian and Latin American tigers. Finally - moral legitimacy is partially reflected by the pragmatic one, yet further exploited especially in the external sphere of the EU action.

Kozma's and Kinzelbach's approach, similarly to that of Williams requires the denoting the audience which defines legitimacy. The most immediate audience of the EU are beneficiaries of its existence – the citizens and the Member States. From this point of view it is important, that the EU in pursuing any of its objectives, acts in line within the limits imposed by the Treaty, but also within realms of national legal systems governed above all by their constitutions, and therefore in line with principles of the rule of law, democracy and human rights (which form the common foundations of any European state). As it has been mentioned above, granting high legal status to those principles gave yet another 'whip' to the Member States which become better equipped to control the European Union. It is important also that those were national courts that forced the ECJ to legitimize its stance by analyzing it with the human rights lens. This is what happened in the early case known for bringing the change of approach towards the fundamental rights – the case *Stauder* of 1969. The case was instigated by a preliminary reference filed by the administrative court in Stuttgart – the question concerned the Community measure and its compatibility with general principles of the Community law and with human rights, in particular. Moreover, one of the first references to human rights which are protected under the EU law comes about in the case *Nold* in which the ECJ clearly pronounces that the 'Court is bound to draw inspiration from constitutional traditions common to the Member States'. The Court cannot, thus, not only disregard those common traditions and the substance they bring, but it is limited in its search for 'inspiration' as to what is their exact meaning.⁶³

There is a clear message sent to Union's direct, closest audience. It seems to be saying – on the basis of your constitutions, and international obligations of your states, we have developed a catalogue of rights which the EU is going to observe. We are also a part of the international community to which you belong which is guided by principles enshrined in the European Convention for Human Rights and in the Charter of the United Nations. This message though reinforced with time is, however, not as clear as it could have been. The Member States eye EU's efforts with a substantial amount of distrust which has been

⁶³ Case 4/73, *Nold v Commission*, [1974] ECR 491, at para. 13.

confirmed by the Britain's and Poland's Protocol on Application of the Charter of Fundamental Rights.⁶⁴

At the same time the EU is sending also addressing the 'wider world' which by and large contributes to the general and regional (equivalent to the ECHR) systems of human rights protection. In order to reinforce this call, both soft and hard legal instruments used by the EU in external relations contain references to norms binding on the EU and those binding the partner states.⁶⁵ Hence the loop closes and the EU's actions can become accepted by the international community.

The second of the concerns expressed in relation to the role that human rights have taken in the EU legal system, in particular in external relations, refers to their use in dealings with the third countries. Human rights even though proclaimed as universal have Western roots, and their presence worldwide is considered as the form of cultural neo-colonialism. Even though the colonial history of the EU Member States is a (not-so-remote) past, the European Union – and in particular some of its Member States - continues to be a predator.⁶⁶ The criticism of the EU as a neo-colonial power is frequently accompanied by the universalistic approach

⁶⁴ Protocol No 30 on Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom. The Protocol was a source of a vivid discussion in the academic circles, however, its practical relevance seems to be minor. For the sample of academic discussion of the subject, please see: Piet Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' 39 *Common Market Law Review*, Jan Barcz, *Fundamental rights protection in the European Union* (Wyd. 1. edn, Wydawn. C.H. Beck 2009), Anna Wyrozumska, 'The Charter of Fundamental Rights of the European Union in the Reform Treaty and the Polish objections' 16 *The Polish quarterly of international affairs*, Josef Franz. Lindner, 'Zur grundsätzlichen Bedeutung des Protokolls über die Anwendung der Grundrechtecharta auf Polen und das Vereinigte Königreich : Zugleich ein Beitrag zur Auslegung von Art. 51 EGC' 6 *Europarecht* 786, Armin von Bogdandy, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* 95.

⁶⁵ See, for example the Preamble to the Cotonou Agreement where apart from *i. a.* the Charter of the United Nations and the ECHR the reference is made to the African Charter on Human and Peoples' Rights and the American Convention on Human Rights. The reference, though in an indirect manner is reiterated in Article 9(2) of the Agreement containing parties' commitment to their international and human rights obligations. Partnership Agreement between the Members of the African and Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part made on 23 June 2000, See also: the unilateral requirements as in the GSP and GSP+: Council Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006. For examples of the soft law instruments with this approach – see: the Action Plans adopted under the European Neighbourhood Policy.

⁶⁶ Leino-Sandberg *op. cit.*; Amartya Kumar Sen, *The idea of justice* (Allen Lane 2009), Rachel Kleinfeld and Kalypso Nicolaidis, 'Can a Post-colonial Power Export the Rule of Law?' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009). For the handbook approach, see: Grażyna Michałowska, 'Rozdział VI - Prawa człowieka w stosunkach Wspólnot z państwami trzecimi' in Grażyna Michałowska (ed), *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej* (Wydawnictwa Akademickie i Profesjonalne 2007). See also with reference to rule of law: Ugo Mattei and Laura Nader, *Plunder : when the rule of law is illegal* (Blackwell 2008).

towards human rights as manifested by the United Nations Organization and therefore its prominent members. The imperialistic nature of universal human rights policy of the European Union is visible exactly in the indifference manifested already at the time of the Treaty of Maastricht to the contribution of the European Union to the substantial debate on what human rights are. As the result, the internal dimension of human rights policy of the European Union remains developed within the framework set in the world by the UN Declaration of Human Rights, in Europe by the European Convention of Human Rights and the ECtHR in Strasbourg and national constitutional and highest courts of justice of the EU Member States. Universalism from this point of view does not pose much of a problem – European states, as summarized in the Preamble to the Treaty on European Union, have common roots (whether they go as far as the Greek city-states, Roman empire or the Christian one is irrelevant for this discussion). In Europe, human rights have become the undisputable ethic code after the second World War and the common point of reference. Lack of respect for them was the common Western World experience. Universalism of the experience lead to the belief in the universalism of values, signing up to which was easier when they demarcated us from those who have committed deeds believed commonly to be evil. There has not yet occurred a change according to which such conceptualization of human rights gained a different dimension.⁶⁷ Universalism has remained the political tool of distinguishing friends from enemies. As such, it keeps on being used in the Treaties, political, and legal instruments employed by the European Union. The external dimension of the EU human rights policies has retained its post-II World War function – you are with us if you

⁶⁷ Although the regional approaches have multiplied in part due to the need for enforcement mechanisms, permitting at the same time focus on more pertinent issues. The examples include American Convention on Human Rights (1978), African Charter of Human and People's Rights (adopted in 1986), the Cairo Declaration on Human Rights in Islam (1987) and the Universal Islamic Declaration of Human Rights in Islam (1981). The diversity or relativism gives rise to serious considerations hence the drastic departure from the adopted universalist model is unlikely. For sample analysis see: David P. Forsythe, *Human Rights and Diversity* (University of Nebraska Press 2004), Eva Brems, *Human Rights : universality and diversity* (Kluwer Law International 2001), Simon Caney and Peter Jones, *Human rights and global diversity* (Portland Frank Cass Publishers 2001) Christopher L. Eisgruber and András Sajó, *Global justice and the bulwarks of localism : human rights in context* (M. Nijhoff 2005) Wolfgang Schmale, Sami Awad Aldeeb Abu-Sahlieh and Ruhr Universität Bochum., *Human rights and cultural diversity : Europe, Arabic-Islamic world, Africa, China* (Keip Pub. 1993) Bamidele A. Ojo, *Human rights and the new world order : universality, acceptability and human diversity* (Nova Science Publishers 1997). On the other hand, there are multiple voices emphasising the inherent flexibility of human rights enforcement which is confirmed also by experimentalist stances taken by some constitutional courts. See, for example the analysis of especially South African Constitutional Court: Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Juta & Company Ltd 2013), Alana Klein, 'Judging as Nudging: New Governance Approaches for the Enforceent of Constitutional Social and Economic Rights' *Columbia Human Rights Law Review* .

subscribe to our values, you are not one of us, if you do not. From this point of view universalism poses a problem and the critique of the European Union actions in this respect has not been addressed in the Treaty of Lisbon. Obviously, given the 'authentication' or 'legitimation' role they were to play, it is highly doubtful that any constitutional act could amend such problem. This does not mean, however, that the universalist approach cannot be modified when dealing with particular states. In fact, the manner in which the European Union uses the existing world and regional human rights treaties and designs its human rights instruments could be seen as the attempt at facing thus posed problem.

This has brought us to the final consideration of this section – namely to the manner in which the European Union creates its global identity. According to Karen Smith⁶⁸ there are seven different dimensions which account for the global 'actorness' of any international entity – these are: economics; international or regional cooperation; promotion of human rights, democracy and good governance; prevention of violent conflict; fight against international crime and terrorism; and military capability. Indeed, the European Union has been active in all of those areas to a bigger or lesser extent depending on its competence attributed to it by the Treaty, and especially in the so-called 'original' – economic - area of its activity, it has been successful in marking its presence on the international arena.⁶⁹ However, areas of human rights, democracy and good governance have definitely not become the EU action brand; even as by-products of other EU policies.⁷⁰ The Treaty of Lisbon has, at least on the surface provided the tools for bridging the gap between the way the Union paints itself and the way it is being perceived by the wider audience. From this point of view the construction of 'normative power Europe' seems to be more feasible.⁷¹

⁶⁸ Karen Elizabeth Smith, *European Union foreign policy in a changing world* (2nd edn, Polity 2008).

⁶⁹ See, for example, the report of the New Zealand, University of Canterbury based National Centre for Research on Europe: *External Perceptions on the EU* presented in Brussels on 19 April 2007. According to the report – the EU is very much visible as a trade partner, an economic organization, pursuing however political objectives which are not clear to the wider public and do not find easy access to press and public discourse coverage in third states.

⁷⁰ Op. cit., at 15 – according to the study the EU is not perceived as a donor of development aid; nor coordinator of policies in this area.

⁷¹ Ian Manners and Københavns universitet. Center for Freds-og Konfliktforskning., *Normative power Europe : a contradiction in terms?* (COPRI 2000).

3. Constitutionality Considerations and their Impact on External Human Rights Policy

In words of Christian Tomuschat the Union has the unnerving daring to look beyond its borders and include the human rights concerns into its foreign policy instruments: 'Instead of looking mainly into its own affairs, the European Union has made it a habit to deal with the human rights situation in other countries, third party states outside the Union.'⁷² Indeed, as we have seen in the considerations above, the EU would deal with its internal matters only to fulfil the Williams's notion of authentication criterion.

This general overview allows for a conclusion that in its formal constitutional provisions the European Union has seemingly developed its human rights policy responding to most of the vivid criticisms uttered against the pursuit of its human rights goals also in external policy. Referring back to the earlier analysis of legitimacy of the European Union in this area, one could claim that the Treaty of Lisbon places the European Union in the commonly understood 'system of norms, values and beliefs' of international community – that of human rights enshrined in the Universal Declaration of Human Rights, and regional systems of human rights protection amounting to the international human rights protection system.

Whilst the Treaty of Lisbon has amended the situation providing for a sound legal basis for the EU's action in the area of fundamental rights, it possibly has paved the way to the more focused analysis of the EU external human rights policy. We could state that whilst the strand of criticisms presented in this section concerned legislating for human rights in the EU, the subsequent ones will focus more on how human rights are enforced externally in various policies of the EU and its secondary legal sources.

The double reference both in the Treaty of Lisbon and instruments of human rights external policy fulfils double function. As Williams has rightly foreseen the 'bifurcation' of the two policies has been maintained for the sake of creation of the European Union image regardless of the real intent to follow them.

⁷² Tomuschat, at 161.

II. Incoherence of the EU External Human Rights Policy

1. The Concept of Incoherence in the Critique of the EU External Human Rights Policy

Coherence is one of the catch-phrases frequently abused when evaluating a policy design. In the language of the primary law of the EU 'consistency' in the context of the external policy appeared already at the time of the Single European Act.⁷³ Its exact meaning has been widely disputed by scholars⁷⁴, yet I do not wish to engage in the discussion of the concept here. Since the purpose of this section is to address the criticisms of the EU, it is rational to assume that the EU is expected to achieve the most complex level of coherence – that referred to by Cremona as synergy between norms, actors, and instruments.⁷⁵ The ultimate utopian aim is that of a policy where there are neither conflicts nor gaps (and if overlaps exist they are necessary for the achievement of a goal) and positive actions on the part of institutions lead to the creation of the synergy⁷⁶. Such description is by no means attributable to the EU external human rights policy.

⁷³ Already Article 30(5) of the Single European Act provided that 'the external policies of the European Community and the policies adopted by the European Political Cooperation must be consistent'. The current Article 3 TEU reads as follows: 'The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.'

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency and shall cooperate to this end. They shall ensure the implementation of these policies, each in accordance with its respective powers.'

⁷⁴ Christophe Hillion based the development of the positive and negative analysis of duties stemming from principle of coherence pointing to various concepts hidden behind various linguistic versions of the notion: Christophe Hillion, 'Tous pour un, un pour tous! Coherence in the External Relations of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008). Koutrakos advocated the broadest understanding of the term amounting to synergy: Panos Koutrakos, *Trade, foreign policy, and defence in EU constitutional law : the legal regulation of sanctions, exports of dual-use goods and armaments* (Hart Pub. 2001), at 39-44. Cremona has devised the diverse understanding of the term coherence based on the difference levels (or concentration) of the duties devised from the term. Hence she distinguishes rules of hierarchy ('encompassing rules for conflict avoidance between potentially conflicting norms and for resolving conflicts when they arise'), rules of delimitation ('avoiding both duplication and gaps'), and principles of cooperation and complementarity ('synergy between norms, actors and instruments'). See: Marise Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?' 3 Hamburg Review of Social Sciences, Marise Cremona, 'Coherence in Foreign Policy – the Legal Dimension' in Panos Koutrakos (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011). For the extensive discussion of coherence in the internal EU policies, see for instance: Sacha Prechal, Bert van Roermund and Oxford University Press., *The Coherence of EU Law The Search for Unity in Divergent Concepts* (Oxford University Press 2008).

⁷⁵ Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?', at 15.

⁷⁶ For the discussion of positive and negative obligations, see: Hillion op. cit.

The analysis will proceed with Cremona's distinction between horizontal and vertical incoherence albeit slightly altered.⁷⁷ On the horizontal axis – the lack of coherence across the policies of the EU, with particular case of the internal – external divide will be observed. On the vertical axis incoherence refers to the differentiated practice with relation to human rights in relation to both third countries and third countries when contrasted to the Member States of the European Union.

The alleged lack of coherence allows for placing the spotlight of this analysis finally solely on EU external human rights policy. The focus shifts thereby also from the constitutional provisions to the manner in which human rights are forged into instruments and subsequently enforced. The lack of coherence of EU external human rights policy is the second most frequently described shortcoming of the EU external human rights policy. Before focusing on particular aspects of the horizontal and vertical incoherence, let us start the analysis with the generic calls for coherence. Yet again, Alston and Weiler⁷⁸ will be our point of departure accompanied by de Búrca's⁷⁹ reflection on the way the human rights policy could have been had the European Political Community come into being. These generic statement serve as an illustration of what coherence would mean if it was to correspond to the ideal of synergy as described above.

2. Coherence for EU human rights policy

Philip Alston and Joseph J. H. H. Weiler in their memorable article *An 'Ever Closer Union' in Need of a Human Rights Policy: the European Union and Human Rights* which was adapted from the report of the Comité de Sages responsible for 'Leading by Example – A Human Rights Agenda for the European Union for the Year 2000' included a number of objectives of the new human rights policy for the European Union's coherence of EU human rights policy from the outset. The proposals are placed in the forefront of their list of recommendations:

'1. (...) there is a need for a comprehensive and coherent EU human rights policy based on a clarification of the constitutional ambiguity which currently bedevils any discussion of Community action in this field;

⁷⁷ Cremona, 'Coherence through Law: What difference will the Treaty of Lisbon make?', at 16-25.

⁷⁸ Alston and Weiler, at 25.

⁷⁹ De Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor'.

2. The development of more consistent linkages between internal and external policies and the promotion of greater interaction and complementarity between the two levels; (...)

7. The elaboration of policy approaches which bring the human rights dimensions of action under each of the three Pillars into closer alignment, while respecting the key differences in terms of Community competence, financing and decision-making processes; (...)⁸⁰

This set of recommendations reflects, in Cremona's terms, rules of delimitation and principles of synergy – especially as ensuring the lack of gaps and overlaps are concerned – the focus is placed on interaction and complementarity and bringing actions 'into closer alignment'. Although intuitively we know that rules of hierarchy – those that are to aid in conflict avoidance – are included in this analysis by implication, it is curious to note that they are not expressly worded. Possibly, should a conflict arise, the resolution thereof is perceived as a task of the Court of Justice. What strikes, is the pragmatic reliance of the authors on institutional coherence – the one to be guaranteed through the constitutional text, with respect for the differences in terms of competence.

It may be useful, at this point, to recall the exercise made by the Gráinne de Búrca⁸¹ who traced the evolution of the EU human rights law back to the envisaged European Political Community Treaty⁸² and to the Comité d'études pour la Constitution européenne (CECE) resolutions. Her analysis provides a vivid contrast to the recommendations of Alston and Weiler made at the eve of constitutional reform. De Búrca takes us back to the European arena in which there existed no supra-national organization and the human rights policy could have been designed from the outset in the most coherent manner.

Indeed, the EPC Treaty envisaged the coherent framework of the policy with clear underlying assumptions and goals to be achieved. Interestingly, the starting point for the human rights policy corresponds to the criticisms discussed in this chapter – the focus was placed on the internal dimension of the policy. The EPC Treaty would have regulated it in the threefold manner.

Firstly, the European Political Community was to 'contribute towards the protection of human rights and fundamental freedoms in Member States' and the integration of

⁸⁰ Alston and Weiler, at 25.

⁸¹ De Búrca, 'The Evolution of EU Human Rights Law', at 483-497.

⁸² The work of the CECE started in 1952 and the subsequent attempt to draft EPC Treaty started was conducted by the Ad Hoc Assembly and its Constitutional Committee (as of May 1952). See: *ibid*, at 468-475.

provisions of the ECHR in the text of the Treaty (Article 3 EPC Treaty).⁸³ There was, therefore, no doubt that human rights were to be the core concern for the Community.

Secondly, the drafters of the EPC Treaty envisaged the Community human rights regime as the part of the external, European human rights regime, to an extent that the jurisdiction over human rights cases concerning the Community would be relinquished by the ECJ to the ECtHR. No mention was made, obviously of the EU separate catalogue of human rights. This design, despite having some similarities to the current scheme, is fundamentally different - the ECHR was to be incorporated into the EU legal system, unlike the current, somewhat forced, borrowing from external system. De Búrca, similarly, comments:

'But even if the EU becomes a party to the ECHR and the Court of Human Rights thereby gains jurisdiction to rule directly on whether the EU has violated provisions of the ECHR, such membership is currently envisaged as an external system of EU accountability to the regional human rights system. More specifically, it has repeatedly been said that EU accession to the ECHR will not affect the autonomy of the European Court of Justice and will not formally subordinate the ECJ to the rulings of the European Court of Human Rights.'⁸⁴

Thirdly, even though the 1950s framework was to be focused on the internal dimension – it externally envisaged the role of the Community in the accession process and foresaw the conditionality to be included in international agreements.

It seems that the opposite is true for the current Treaty text regardless of the upgraded status of the Charter for Fundamental Rights and the accession of the EU to the ECHR. The comparison of the Lisbon Treaty provisions (Articles 2 and 3) concerning the external and internal dimensions of the policy have lead de Búrca to the following conclusion:

'(W)hile the protection of human rights is asserted as an overarching objective in all EU external relations, in its internal policies the EU treats the proper sphere of human rights policy as being limited to those areas of EU power or competence which directly promote human rights – ie mainly anti-discrimination and social inclusion policy.'⁸⁵

De Búrca, therefore, reiterates the claim made by Williams in 2004 in his 'Study in Irony'. And even though the initial intention of her analysis was to alter the standard tale on human rights, the ultimate result is quite the opposite. Coherence, even if not a complete one, could have been easily achieved at the time of creation of the EPC. It is way more difficult to

⁸³ See: Article 2 of the EPC Treaty as quoted *ibid* at 483.

⁸⁴ *Ibid* at 487.

⁸⁵ *Ibid* at 492.

amend existing structures than building from the scratch. The comparison rendered in such way is definitely unfavourable and, to a certain extent unjust towards the current framework – no matter how incoherent it may be. For, there is no doubt that the now existing Union has been developing step by step – moving forward though maybe not at the pace desired, neither in the mode proposed.⁸⁶ The inherent experimentation that results from the evolutionary road should not be, however, underestimated.

3. Horizontal Incoherence – Take 1 - Internal v External Human Rights Policy

As we have seen in the previous sections, the incoherence between the EU human rights activity in the internal and external spheres has been a contentious issue ever since there was a talk of any kind of European human rights policy. Hardly equipped with the internal competence, the EC noted the need for the presence of human rights in its external relations already (or as late as) in 1979 and took to actively include the area in its external instruments. In 1989 and 1990⁸⁷ did the first human rights clauses appear in agreements with thirds states entered into by the European Union. Ever since the European Union has been criticised for its 'apparently greater willingness to promote and enforce human rights – through forms of conditionality including the use of negative sanctions – in its external policies than in its internal policies'.⁸⁸

Again Alston and Weiler state with reference to bridging the gap between internal and external dimension of EU human rights policy:

'In the case of the Union, there are several additional reasons why a concern with external policy also necessitates a careful consideration of the internal policy dimensions. Firstly, the development and implementation of an effective external human rights policy can only be undertaken in the context of appropriate internal institutional arrangements. Secondly, in an era when universality and indivisibility are the touchstones of human rights, an external policy which is not underpinned by a comparably comprehensive and authentic internal policy can have no hope of being taken seriously. Thirdly, as the next millennium approaches, a credible, human rights policy must assiduously avoid unilateralism and double

⁸⁶ Johan Galtung and International Peace Research Institute., *The European Community: a superpower in the making* (Universitetforlaget; Allen and Unwin 1973).

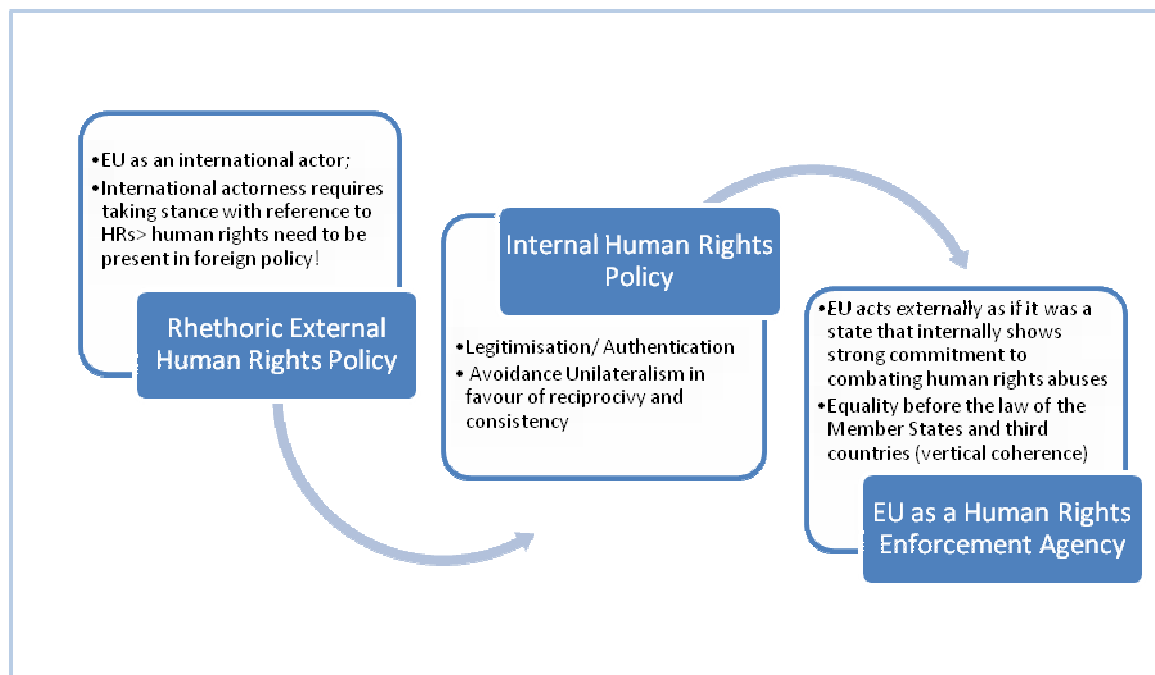
⁸⁷ The first reference can be found in the Lomé IV; the first human rights clauses are to be found in agreements with Argentina and Chile – see Article 5(2) of the Lomé IV Convention, OJ 1989 L 229, 17 August 1989, pp. 19-20; Articles 1(1) of agreements with Argentina and Chile, see, respectively: OJ 1990 L 295/67, 26 October 1990; and OJ 1991 L 79, 26 March 1991, pp. 0002 – 0011. For the history of the development of the human rights clauses see Chapter 1 of: Bartels, op. cit.

⁸⁸ Craig and De Búrca, at 407.

standards and that can only be done by ensuring reciprocity and consistency. Finally, the reality is that a Union which is not prepared to embrace a strong human rights policy for itself is highly unlikely to develop a fully-fledged external policy and apply it with energy or consistency. As long as human rights remain a suspect preoccupation within, their status without will remain tenuous.¹⁸⁹

This view on his own has been subsequently and consistently repeated by other scholars⁹⁰, including Williams⁹¹, Rosas and Brandtner⁹² and, most recently Grainné de Burca⁹³, who frequently assumed it as the starting point to their critique of the human rights respect, protection and enforcement by the EU. The critique of this aspect of EU external human rights policy and the reasoning behind it is presented below as Graph No 1.

Graph No 1: The Reasoning Behind the Need for Internal-External Human Rights Policy Coherence



⁸⁹ Alston, Bustelo and Heenan Similarly, in the context of the enlargement policy, see: Bruno De Witte, 'Enlargement and the EU Constitution' in Marise Cremona (ed), *The Enlargement of the European Union* (Hart Publishing 2003) at 233-41.

⁹⁰ Marika Lerch and Guido Schwellnus, 'Normative by nature? The role of coherence in justifying the EU's external human rights policy' 13 *Journal of European Public Policy* Elizabeth Shaver Duquette, 'Human Rights in the European Union: Internal Versus External Objectives' 34 *Cornell International Law Journal* Tomuschat; Gries and Alleweldt Albi; Eleanor Spaventa, 'Fundamental What? The Difficult Relationship between Foreign Policy and Fundamental Rights' in Marise Cremona and Bruno de Witte (eds), *EU foreign relations law : constitutional fundamentals* (Hart 2008).

⁹¹ Williams, *EU human rights policies : a study in irony*, op. cit.

⁹² Barbara Brandtner and Allan Rosas in: Alston, Bustelo and Heenan, op. cit.

⁹³ De Búrca, 'The Evolution of EU Human Rights Law', op. cit.

The EU is international actor and as such it is required to take a stance with regard to human rights. This obligation is justified in a twofold manner – firstly because of its own branding. In the words of Dierckxsens:

‘In order to establish normative legitimacy in the European Union – on other words in order to fill the paradoxical gap between legal and social legitimacy – constitutional engineering will not suffice. The European Union should also be given a normative appeal. Europe should stand for a model of society that is able to counterbalance the neo-liberal and the neo-romantic vision.’⁹⁴

Secondly, as de Búrca⁹⁵ rightly points out – the importance of human rights is such that no international actor can permit itself neglecting thereof. Hence, foreign policy of any international actor that is to be seriously taken has to include the reference to human rights. Yet, this reference is legitimised only through the coherent stance towards policy object, and, therefore must constitute an internal commitment that permits reciprocity. Only once it is in place, can the EU be perceived as the human rights enforcement agency. This, in turn has further implications, especially for the vertical coherence inasmuch as the EU is obliged to treat third countries and its Member States alike.

In short, for the human rights to be efficient externally, it is essential that they are present internally, that they are being pursued with the same zeal and energy and are given the same key value as in external policy. The idea is clear – projecting light requires being a source of it. In other words, the EU should shine by example in order to be able to normatively act in the world. Without this 'shine', following Weiler and Alston, there is not much likelihood that the actions undertaken by the Union are to be accepted by third parties. In the absence of the internal-external legally entrenched inter-relatedness the commitment to human rights in external relations remains void of content and retains purely rhetoric quality.

This reasoning, though logical has taken an immense time to sink into the constitutional structure of the European Union. It can be explained through two factors – in part by

⁹⁴ Stephanie Dierckxsens, ‘Chapter 12 - Legitimacy in the European Union and the Limits of the Law’ in Erik Claes, Wouter Devroe and Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer 2009), at 204. Neo-romantic vision of the society entails the focus on the set of forces that capture pre-political identification factors such as religion, ethnicity, language, culture etc.

⁹⁵ de Búrca, op. cit.

institutional dynamics, and, on the other hand, by the inherent complexity of the EU system of competence.

Andrew Williams, in particular, blames the maintenance of 'bifurcation' – the cleavage between the internal and external manifestation of the human rights policy - on the institutions of the EU.⁹⁶ The formulations of the Charter and the limitations of the mandate of the Fundamental Rights Agency make this point more vivid. Whilst the Charter does, in theory⁹⁷, apply to the institutions, agencies, and offices of the Union, the FRA irrelevance in the field is more problematic. Clearly, when dealing with external problems, the EU's institutions like to enjoy a wider margin of discretion. Yet, even there, sooner or later issues pertaining to fundamental rights will emerge. The case of FRONTEX's Consultative Forum on Fundamental Rights and Fundamental Rights Officer illustrates well this phenomenon.⁹⁸

Furthermore, the inherent complexity of the EU system of competence has not been altered. As indicated by Williams – human rights appear in the most difficult areas of the functioning of the Union. Internally, apart from the principle of equality and non-discrimination essential for the internal market, they are considered a part of the Area of Freedom, Security and Justice (AFSJ). By its nature, it is a cross-cutting area belonging to the shared competence of the Union and its Member States – and similarly to the external area – full of contentious concerns. The consequential mix of problematic issues present in this cluster of policies makes it more difficult for the Union to pursue the underlying one. Fundamental rights are instrumental⁹⁹ but their treatment lacks depth if not a deeper philosophical commitment. In external area, human rights fall within the category of external relations associated with trade, development and general cooperation policies, Common Foreign and Security Policy, and as the spill-over of the actions undertaken under the AFSJ umbrella. These are, therefore, three diverse regimes. It remains to be seen whether the distinctiveness of each of them will be maintained or enhanced through three various regimes in which the internal/external divide is constructed.

⁹⁶ Williams, *EU human rights policies : a study in irony* EU human rights policies : a study in irony, op. cit.

⁹⁷ As there was no case concerning the Charter and the external relations of the EU.

⁹⁸ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304/01.

⁹⁹ This is even reflected by the Treaty formulation providing for the AFSJ. Article 67 TFEU states that: 'The Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States.'

4. Horizontal Incoherence – Take 2 - Human Rights v Other Policy Concerns in the EU External Relations

The second of horizontal issues discussed with reference to EU external human rights policy is that of synergy between the norms, actors and instruments used, or, following the formulation of Alston and Weiler terms such '(...) elaboration of policy approaches which bring the human rights dimensions of action under each of the three Pillars into closer alignment, while respecting the key differences in terms of Community competence, financing and decision-making processes; (...)'¹⁰⁰. Neither the generic formulation of current Article 3(5) TEU and Union's obligation to 'promote and uphold its values', nor that of Article 21 TEU where the Union is to consolidate and support democracy, rule of law, and human rights provide the information on how the EU should treat human rights objectives as opposed to other policy objectives. The lack of rules of hierarchy creates doubts as to the actual commitment on the part of the EU to human rights and creates the impression of their secondary importance. The impression is made more apparent if one scrutinises the practice of human rights in EU external relations as the lack of safeguards for human rights goals is more visible.

The secondary importance of human rights is especially apparent when they clash with imminent interests of the EU – especially those of maintaining security in the region and ensuring economic development. The literature on nexuses between human rights and development, migration, and security particularly well illustrates the lack of required synergy in those areas.

The nexus Human Rights and Development seems to be the most straight forward out of the three. This is possibly the case, as the EU human rights conditionality has developed in this context. It refers to the two aspects of the policy – that of human rights being complementary for development and that of the policy being based and implemented from the rights perspective. The latter approach has been developed by the UN. The Human Rights Based Approach to Development created the methodology according to which, in line with Sen's vision¹⁰¹, human rights and development concerns should be developed along the same lines, parallelly, as they are interconnected and interdependent. Though the idea on

¹⁰⁰ Alston and Weiler, at 25.

¹⁰¹ Amartya Kumar Sen, *Development as freedom* (Oxford University Press 1999).

the face of it has been logical, the legal (human rights focused) and development (practitioners and field officers) community disagreed strongly on the issue. And so did the criticism towards the approach trickle down from the UN to the EU level. Philip Alston¹⁰² wrote about development and human rights as ships passing each other in the night, and not much has changed since his criticism was published in 2005. Yet in criticisms addressed against the EU policy in this area, there is a number of problematic issues that overlap characteristic for the EU. First of all, the EU is a donor, but it works together with its Member States. Development is the area of shared competence which makes it more difficult for the EU to change the overall image of the policy. Secondly, development aid, being often connected with trade and investment, is a natural policy field for the EU to pursue. It is not the case with human rights.

In case of the Human Rights – Security Nexus we are faced with a different kind of function that human rights bear. Here, they act as a break to the overly interventionist policies both internally and externally. The *Kadi* case¹⁰³ provides an excellent example of a situation in which the EU projects its values through the court's judgement and though attempting to affect the international sphere, fails to do so, because of the security policy referring more to the state security, and its lack of a direct influence on the UN. Another example of human rights concerns contradicting security purposes is that of the negotiated agreement with the US concerning data protection. The negotiations show that high internal standard of data protection on the Union level does not translate well in the international fight against terrorism. The criticisms of the nexus, therefore, go two ways – either against the insufficient provision of security to the Member States or the insufficient protection of the human rights as ensured by the Union.

Finally, the nexus Human Rights – Migration provides an example of an area in which the nascent EU policy fails to accommodate human rights concerns as protection from migration whilst migration remains the primary concern of the EU. The attempt to 'export' immigration

¹⁰² Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals.' Philip Alston, Mary Robinson and New York University. Center for Human Rights and Global Justice., *Human rights and development : towards mutual reinforcement* (Oxford University Press 2005).

¹⁰³ CJEU, *Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, Grainne De Burca, 'The EU, the European Court of Justice and the International Legal Order after Kadi.' 1 Harvard International Law Journal.

controls to neighbouring countries¹⁰⁴, the incoherent interpretations of the right to the family life (Article 8 ECHR)¹⁰⁵, the returns directive case law¹⁰⁶ provide just a few examples of incoherence within the nexus itself, not only the treatment of the people affected.

5. Vertical Incoherence – Take 1 - Unequal Treatment of Third Countries

The second scene of the incoherence of the EU policy concerning differentiated treatment of states can be pictured amongst the third states. In concrete terms this refers to the application or non-application of the existing instruments of the EU human rights external policy in case of human rights abuses. The following instruments¹⁰⁷ are employed by the European Union in its human rights external policy realm and, therefore, in the area of trade, development, and CFSP:

1. Negative conditionality (usually through inclusion of essential elements and non-execution clauses in international agreements);
2. Positive conditionality (used in a form of hard law instrument in the accession process and GSP+ Regulation; as soft law functions under the European Neighbourhood Policy)¹
3. Financial Assistance (especially: the European Neighbourhood Policy Instrument (ENPI), the European Instrument for Democracy and Human Rights (EIDHR));
4. Political Dialogue;
5. Cooperation with the Council of Europe, the UN and the OECD.

The criticisms are distributed evenly in this catalogue and stem from various sources. Generally, non-governmental organisations lament over the lack of concrete and radical measures on the part of the European Union. The Amnesty's International Report 2009 referred to the lack of attention on the part of the European Community to the consequences of the world financial and economic crisis on the state of human rights in the

¹⁰⁴ See, on the example of Ukraine: Lyubov Zhyznomirska, 'Externalities of the EU Immigration and Asylum Policy: The Case of Ukraine' Review of European and Russian Affairs .

¹⁰⁵ See, the overview of the case law of the CJEU and the ECHR: Nuala Mole, 'Family reunification in EU law and under the ECHR' Family Reunification Project WP <<http://familyreunification.eu/wp-content/uploads/2012/05/Aire-Family-reunification-in-EU-law-and-under-the-ECHR.pdf>> . See also other publications of the Family Reunification Project: <http://familyreunification.eu/index.php/project-publications-4/>

¹⁰⁶ See the thread of case law on the implementation of the Return directive in Member States: *CJEU, Case C-357/09 PPU Kadzoev* [2009] ECR I-11189, *CJEU, Case C-61/11 PPU Hassen El Dridi alias Soufi Karim* [2011] ECR I-3015, *CJEU, Case C-329/11 Achughbabian* [2011] ECR I-12695,

¹⁰⁷ For the extensive discussion of the analyzed instruments – see: Chapter 4.

world and therefore criticised the EU for lack of flexibility and short-sightedness in this respect.¹⁰⁸ Amnesty did not elaborate how far-sightedness and flexibility translate into concrete measures. Criticisms of the academic environment¹⁰⁹ concern mainly the lack of coherence in human rights policies of the European Union, recourse to mainly diplomatic measures in cases of blatant human rights abuses, application of double standards (cases of Palestine Autonomy and Israel¹¹⁰, the United States and China) or non-application of measures despite their availability (usually of non-execution clauses)¹¹¹ as well as allegations targeting the value-related colonial aspirations of former colonial powers.

However, distinction (and, therefore distinctive critique) needs to be made with reference to the 'EU-governed' instruments such as conditionalities and the GSP+ and financial regulations and the ones which constitute the part of the international system of human right protection and international diplomacy (political dialogue and cooperation under the auspices of other international organizations such as the Council of Europe, OECD and the UN). The former group of instruments has to be viewed from the perspective of the EU interest – they have been devised as the instruments of an international actor which adheres to and promotes certain type of values and norms.

Their formulation is determined by the rules of international law and the legal system of the European Union with all its opportunities and limitations. Here the EU is criticised for not only imposing the standards, but also the manner of their enforcement and the approach towards third countries in their creation.

The latter group of instruments, on the other hand, belongs to the widely accepted catalogue of tools employed by international community. The political dialogue is the most common tool of diplomacy, applicable either complementarily with other instruments or whenever nothing else can be agreed on. As such, without underestimating its importance, it serves as a confirmation that something is being done, and thus as a rhetorical means of

¹⁰⁸ See: Amnesty International Report 2009 at < <http://thereport.amnesty.org/en/>> accessed on 29 May 2010.

¹⁰⁹ See: Williams, *EU human rights policies : a study in irony*, Lampe, op. cit, Alston, Robinson and New York University. Center for Human Rights and Global Justice., Bulterman, op. cit., Alston and Weiler, op. cit., Frank Hoffmeister, *Menschenrechts- und Demokratiekláuseln in den vertraglichen Aussenbeziehungen der Europäischen Gemeinschaft = Human rights and democracy clauses in EC agreements with third states* (Springer 1998).

¹¹⁰ Nathalie Tocci, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies 2005).

¹¹¹ See: Bartels op. cit., Fierro Sedano op. cit.

subscribing to a certain area of policy (be it human rights or other). The European Union engages in a political dialogue with every country with which it maintains relations regardless of human rights record of this country – one could say that it is the most coherently applied tool for its human rights external policy. Yet, as such, it remains as any dialogue – voluntary, unbinding, easily fluctuating and inefficient. The activity of the Union on the forum of the UN¹¹², Council of Europe¹¹³, and OECD¹¹⁴ (which indirectly affects human rights problems) is of different character. Here the EU is acting in line with other members of a given organization, though it does not enjoy the status of the member of any of them. As the result, these are the Member States that are visible and equipped in decision making power on the forums of those organizations. The EU's contribution (especially in the form of financial support) is allegedly not visible. Yet again the system of law – this time international has disabled EU's policy impact.

In sum, amongst the human rights policy instruments employed by the European Union, we can find those which include the EU in the international community of human rights protection system and those which have been to a larger or lesser extent generically developed by the EU itself. It is the latter group that focuses the biggest amount of criticism despite its innovative nature. Whether the external relations instruments are to be truly evaluated negatively shall be assessed in the subsequent parts of this study. For now, I would like to give the brief overview at how severe the disease is.

Firstly, the negative and the positive conditionalities have been employed by the EU externally in an inconsistent manner as noted by Elena Fierro¹¹⁵ and Lorand Bartels¹¹⁶. The

¹¹² On 3 May 2011 the UN General Assembly has passed a resolution on the participation of the EU in the UN work which granted the EU a special status at the UN General Assembly. The resolution allows the EU representatives to present the common positions, to make interventions during sessions, to present proposals and amendments agreed by the EU Member States, and to reply concerning the positions of the EU. See: Resolution adopted by the General Assembly on 3 May 2011, Participation of the European Union in the work of the United Nations, Resolution No A/RES/65/276.

¹¹³ Since April 2001 the cooperation has taken a more institutional form once the Joint Declaration on Cooperation and Partnership was signed. According to the data available on the Council of Europe website since 1993 there have been approximately 180 joint programmes of the Council of Europe and the European Union, majority of them financed through the EIDHR.

¹¹⁴ Since the 1960 Additional Protocol No 1 annexed to the Convention of the Organization for Economic Cooperation and Development the European Commission has taken part in the work of the OECD which *de facto* meant quasi-membership in the works of the organization.

¹¹⁵ Fierro Sedano, op. cit.

¹¹⁶ Bartels, op. cit.

incoherence has been emphasised by the European Parliament.¹¹⁷ The human rights clauses (understood collectively as the essential element and the non-execution clause) in standard international agreements have been enforced in few cases, more frequently were they evoked in the consultation procedures which preceded the suspension of an agreement. This seems logical given that the suspension of the agreement is, in fact an ultimate sanction which can be imposed under any agreement's regime.¹¹⁸ And as such, as it has been noted in the literature on sanctions in international law¹¹⁹, it affects to a higher degree the population – rarely the third country's government and administration. Nevertheless, the modesty in enforcement of the human rights clauses by the EU is hardly a result of concern for third country's population or economy. Instead, it is more a consequence of combination of factors such as: partner's status on the international stage (and so his *de facto* power), his willingness to collaborate on EU's terms, the interest of the EU in maintaining the bonds with a third country at all costs. Examples are multiple – the US¹²⁰, China¹²¹ and Russia¹²² are most probably the most obvious odd-ones-out partners of the EU, with by no means clean human rights record. No form of conditionality can affect drastically and immediately the political reality of relationships between the EU and those states. The political and economical interest prevails over the international law rules which, in these cases, are applicable to equal, if not more powerful actors - true partners. They cannot be equalled

¹¹⁷ European Parliament, *Human rights dialogues and consultations on human rights with third countries* (6 September 2007).

¹¹⁸ See: Article 96 of the Vienna Convention on the Law of Treaties.

¹¹⁹ See, for instance: Clara Portela, *European Union sanctions and foreign policy : when and why do they work?* (Routledge 2012)

¹²⁰ The relationship with the USA is based on the political Transatlantic Economic Partnership fuelled by the New Transatlantic Agenda. Human rights are not addressed in those documents in a comprehensive manner – instead there are references to particular areas of rights – i. e. core labour standards. See the overview at: http://eeas.europa.eu/us/index_en.htm.

¹²¹ The relationship between the EU and the People's Republic of China has been governed by the 1985 Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, OJ 1985 L 250, which has been gradually complemented by 50 sectoral dialogues (including that of human rights). No provision of the agreement does relate to principles of rule of law or human rights. Since 2007 there have been ongoing negotiations on upgrading of the agreement to the Partnership and Cooperation Agreement. Human rights have been discussed with China under the framework of the mentioned dialogues and, additionally, during the specific human rights dialogues which have been held twice a year since 1995.

¹²² Relations with Russia are governed by the 1994 PCA: *Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, of 24 June 1994* ; there are ongoing negotiations of the new EU-Russia Agreement. Complementary is the political cooperation in the area of four Common Spaces: economic issues and the environment; Freedom, Security and Justice; External Security; and Research and Education. Human Rights constitute an essential elements clause, however, in case of non-compliance, the issue is to be discussed within the cooperation council so the sole measures to be applied are articles 65 – 67 VCLT.

with small and less economically meaningful states for whom, as it seems, the human rights clauses have been made where there is interest in fulfilling human rights obligations in exchange of other types of benefits (be it development aid, trade or investment incentives).

By extension, to a certain degree, conditionality has been regarded as efficient in the more interest based process of accession. What is referred to as 'the carrot and stick approach', allows for the assumption that the perspective of the membership gives enough of an incentive to states which willingly adopt the principles underlying European democratic states – democracy, rule of law, human rights. Thus construed process is focused on the institutional adjustments as required by the Union and foresees gradual change of governing culture. Despite this flaw, however, the acceding countries have been successful in complying with EU's requirements, yet the criticism remains as to the subsequent development of human rights culture.

Given these inconsistencies in the application of human rights instruments, had the EU been a Member State, it would have been certainly punished by the Court and the Commission for infringing principles of equality and non-discrimination. Yet, it is not – externally it functions within the realm of international law which remains relatively silent on the issue of positive duties of international organizations. International legal system is neither equipped with an efficient prosecutor such as the European Commission, nor it is capable and free to quickly respond to abuses or inconsistencies in action on the part of the members of international community. As a result, the European Union is free to apply its own instruments in any manner it deems appropriate. The incoherence characteristic for the application of the toolbox is a consequence of the design of its external policy; that one, in turn, is determined by the internal design of the European Union and its general (in)ability to act and speak with one voice. This brings us back to the general question as to what kind of Union is there on paper in the Treaty formulations and what kind of Union is implemented. Yet again, it remains to be seen whether the current construction of the European External Actions Service can in any way influence the hypocritical approach towards the third countries characteristic for the second of three facades of the incoherence.

The internal-external dichotomy in the EU human rights policy has been already discussed through the lens of the constitutional design of the European Union. Mention must be also

made of the prevailing enforcement practice of the European Union, the postulates made and their possible reflection in the practice of the institutions.

'The EU purveys a notion of the rule of law in its external dealings, particularly in development, trade and accession policies. It is represented as a paragon of virtue when it comes to fulfilling aspects of the rule of law and promotes many projects associated with developing the ability of third states to adhere to the rule of law. But the apparent incapacity of the EU to exercise any value control over its Member States on rendition suggests an ironical distance between the external and internal adherence to this concept. Does the export of this idea, then, reflect something of the internal understanding? Or does it demonstrate the relative lack of application internally by comparison?'¹²³

To summarize, the discussed differentiated treatment of the third countries and, therefore, the inconsistent application of available instruments has been present in the European Union foreign policy. As it seems, the instruments have been devised in such a manner as to be coherently included whenever a cooperation with third countries takes place, thus adding to the legitimacy of the Union. At the same time, however, though framed in legal terms, they were always flexible enough so as to leave space for political decisions. This is, obviously, characteristic for the realm of the foreign policy, but not consistent with the supposedly prevalent and apparently cross-cutting area of human rights policy.

¹²³ Williams, *The ethos of Europe : values, law and justice in the EU*, at 72.

6. Vertical Incoherence – Take 2 - Unequal Treatment of Third Countries v Member States

The internal dimension of the discussed differentiated treatment can be, in turn, subject to further sub-division. Yet again, we can speak of the internal and external situations in which the EU could 'discipline' its Member States and yet refrains from doing so. The former takes place when a Member State acts within the realm of its *imperium* on its own territory. The latter, finds a Member State originating entity acting outside of the territory of the European Union.

The first of the identified incoherent actions on the part of the Union can be illustrated by fairly well researched and analysed examples from the European legal social and political life. If we take Haider's affair in Austria, the case of the Media Law and the constitution in Hungary and the clear prosecution of the Polish minority in Lithuania, we end up drawing a picture of Europe in which various states experience various treatments. The strong reaction of the European Union and the Member States to Haider's party presence and success in Austria was the resultant of many factors – the World War II ideological experiences, the historical role of Austria, finally, the need to respect the rule of law and principles of democracy within the European Union. It was, to a lesser extent, a reaction to the human rights actual or potential abuse. The cases of Hungary and Lithuania are different – in the former one, it was the European Parliament that took on the role of the voice of the Union, speaking out against the potential and feared censorship and, thus, the infringement of the freedom of speech. Similarly, with reference to the constitution, those were the Member States and the EU parliamentarians¹²⁴ that spotlighted the issue. The MEPs called for Hungary to submit the constitution for the review of the European Commission, whilst the Parliamentary Assembly of the Council of Europe commissioned the Venice Commission the task of preparing an opinion on the new Hungarian constitution.¹²⁵

Similarly, it is the European Parliamentarian – Tomaszewski who, while responding to his direct constituency – that of the Polish minority in Lithuania – has been trying to focus public

¹²⁴ Alliance of Liberals and Democrats for Europe, 'New Hungarian constitution threatens European values ' <<http://www.alde.eu/press/press-and-release-news/press-release/article/new-hungarian-constitution-threatens-european-values-37350/>> .

¹²⁵ Council of Europe, 'Venice Commission's forthcoming opinion on the new Hungarian Constitution' <<http://www.venice.coe.int/>> . See, also: CJEU, Case C-391/09 *Runevic-Vardyn* [2011] ECR I-3787

opinion's attention on the abuse of minority rights by the Lithuanian government which, infringed clearly upon the basic human rights as well – like the right to identity, and name as its expression.¹²⁶

There is a loud critique on the part of the parties involved, calling up the Union for the action.¹²⁷ Curiously (or perhaps: unsurprisingly) this action hardly ever comes. Austrian case was the first unprecedented event in which the EU-14 at the time have taken the bilateral, though coordinated, action which rendered Austria evidently the pariah of the EU. Though there were voices that sanctions thus imposed were a result of particular interests rather than the EU based common shared values, there is no doubt that the latter had created the clear basis for action.¹²⁸ One could speculate that there are reasons why some events in domestic politics did lead to a decisive action on the part of the EU institutions, and others didn't, yet the critique remains intact. Ideally, there should be no differentiation, especially given the discussed commitment to the ECHR.¹²⁹ Yet, any disturbance of a delicate balance between the domestic politics of the Member States and the one on the European level remains a contagious issue. Nevertheless, again the European norms prove to be instrumental for the control of the institution – not of the Member States.

On the other hand, one could argue that none of the situations could constitute the basis for the 'reasoned proposal' as advocated by the reformed Article 7 TEU, which is the basis for the 'Member States' disciplining measures.¹³⁰ It remains to be seen how the two described

¹²⁶ See: the case law of the ECtHR on the constitutive elements of human identity.

¹²⁷ See for instance: Związek Polaków na Litwie, Raport o Dyskryminacyjnych Praktykach Władz Republiki Litewskiej względem Mniejszości Narodowych, at: <http://www.zpl.lt/2011/02/raport-o-dyskryminacyjnych-praktykach-wladz-republiki-litewskiej-wzgledem-mniejszosci-narodowych/>, etc.

¹²⁸ Michael Merlingen, Cas Mudde and Ulrich Sedelmeier, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria' 39 Journal of Common Market Studies.

¹²⁹ The Lithuanian *Vardyn* case could be argued analogously to the recent case before the ECJ - the *Seyn von Wittgenstein* case of December 2010 (CJEU, *Case Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien* [2010] ECR I-13693) in which the lawyers of the appellant made the connection between the freedom to provide services, freedom of movement and the right to the name as the constituent element of a human persons' identity.

¹³⁰ Article 7 TEU (*ex Article 7 TEU*): '1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a

situations will develop and whether the EU will chose to act once given the improved Article 7 TEU. Should this be the case, the importance of the action subsequent to publication of the Venice Commission's report should not be underestimated.

The second dimension of the discussed double-double standards can be illustrated by numerous examples of the abuses performed by the economic actors seated in the EU which participate in the global economy and benefit from bilateral and mixed investment treaties. The recent, ultimately, ICJ judged case *Pulp Mills Case*¹³¹ provides an example of this type of situation where the right to the clean environment had as its opponent the rights of investors (in this case coming from Finland) and of the country in which the investment was to take place (Uruguay). It is true that the complicated structure of the investment treaties regime did not make the simple, disciplining response to this type of abusive behaviours on the part of EU based companies; nor towards the Member States¹³². On the other hand, if it is the international community reacting, the EU has no choice but to respond as shown by the oil leak case in the Mexican bay.¹³³ However, this types of cases yet again provide for the example of the differentiated treatment of Member States' seated entities acting abroad.

The criticism of the double standard of treatment between the Member States and third countries and, therefore, incoherence in the policy application and development is not wide spread – it is uttered mainly by the non-governmental organizations, local politicians, rarely wider European forums or institutions, who look up to the European Union for help whenever some of values deemed to be underlying Europe are threatened. This can be

serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.'

¹³¹ ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*,. 2010 ICJ (Apr 20).

¹³² The Treaty of Lisbon has amended the hitherto existing architecture by including the foreign direct investment in the realm of exclusive competence of the European Union (Article 207 TFEU – *ex Article 133 TEC*).

¹³³ See, on regulatory measures: <http://www.ibtimes.com/european-union-imposes-fresh-regulations-offshore-oil-gas-responding-2010-bp-oil-spill-1298175>

explained by the difficulty to pin-point the abuse on the one hand, and rather elusive standard of what can be expected from various categories of states. Rarely, does it reach other international organizations or, generally speaking, the international community – however, if it does, the EU finally feels compelled to act.

III. Conclusions – What Do Those Criticisms Tell Us About The EU External Human Rights Policy?

Criticising EU human rights policy in both of its aspects has become an academic sport or a pass-time activity. Human rights policy, next to the discussion of EU integration constitute the second most prolific theme to write about. From the perspective of this study it is more than perfect, as the multitude of sources provides a wealth of information about the ideal this policy is to follow. The table below makes an attempt at organising the extracted criticisms and classifying them from the point of view of the subject matter they deal with. Generally speaking, each of them provides an outlook on the policy clearly from the systemic point of view. Hence, we need to speak of constitutionalist approaches on the part of the academics dealing with the area. The ‘constitutionalist’ path of reasoning is also connected with the discussion of EU and international human rights law demonstrating the intersection between various legal areas. The question of relationship between them needs to be determined by the EU legal system as well. This classification amounts to a proposition as to what is the required paradigm the EU external human rights policy is to follow. Constitutionalism implies fairly stringent procedural rules; it implies the existence or expectation of rule of law as constituting a part of EU rule of law.

Table 1: Criticising EU (external) human rights policy

Human rights as a component of EU legal order	<ul style="list-style-type: none"> - need for a legal/constitutional basis; - principles v objectives; 	Constitutionalist criticisms
Horizontal Incoherence: external v internal aspects of the policy between various fields of external relations policy	<ul style="list-style-type: none"> - comprehensiveness and uniformity of the policy across the policy fields; - competence; - institutional design 	Constitutionalist criticisms

Vertical incoherence: with reference to third countries with reference to the EU Member States	- design of instruments; - use of instruments	Realist (power) related criticisms/International law type of criticisms
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The information about the expected performance of the EU as presented in the table reflects the building of the institutional ethos of the European Union that comes hand in hand with the development of the legal system. In Williams's words: '(...) through the EU's construction as a polity that attempts to impose order on the basis of espoused values or principles, an institutional ethos is created. We may not like its nature (assuming we can determine it) but we should not dismiss its presence and influence. Second, law occupies a hugely significant place within the construction of the institutional ethos.'¹³⁴ Such approach echoes Weiler's observation about the qualities attributed to the brand 'European Union'.¹³⁵

The EU bears, according to authors whose opinions are gathered in Chapter 1, the characteristics of an entity capable of having a constitution and as such is also required to observe the rule of law principles. Yet, in addition to that, the EU is apparently capable of surpassing the limits of the classical international dealings and going beyond the conventional frameworks as its experimentalist framework has demonstrated. The emancipation of the EU legal order from the international legal one has proven this point sufficiently.

Chapter 1 of this study provided us with a starting point in the quest for the deeper comprehension of the image and the content of the EU external human rights policy. Guided by the academics working in the area, we have been given a direction. The constitutionalist base requires that the EU develops and takes on the elements of the ethos. Since in the particular context of the present analysis we are primarily interested in how the EU pursues its external human rights objectives, the direction to be taken in the subsequent parts of this study hint at rule of law elements. This is where the Chapter 2 will start off.

¹³⁴ Williams, *The ethos of Europe : values, law and justice in the EU* at 11.

¹³⁵ '(...) the Union has become a product for which the managers, alarmed by consume dissatisfaction, are engaged in brand development. Citizenship and the "rights" associated with it are meant to give the product a new image (since it adds very little in substance) and make the product ever more attractive to its consumers, to re-established their attachment to their favourite brand.' In: Weiler, at 333-334.

Chapter 2 - Extracting Benchmarks and Drafting Methodology – Constitutionalism, Rule of Law, and the Policy Cycle for the EU External Human Rights Policy

道可道非常道,

名可名非常名

*The Tao that can be told is not the eternal Tao;
The name that can be named is not the eternal name.*¹³⁶

I. Setting the Ground for the Search of the Benchmark - the EU and the International Law

Before making the first attempt to uncover the benchmarks¹³⁷ which underlie the above presented criticisms of the EU external human rights policy, I would like to take a detour and place the discussion and choice of this particular analytical framework in the context of the debate on the nature of the European law's development that has been taking place over the past fifteen years. This discussion will help to position the criticisms presented in Chapter 1 within the broader analysis of the characteristics of EU law and will further ground a search for a paradigm for the analysis to be applied to EU external human rights policy instruments.

Since we are moving in the context of the inter-section between legal systems, the position of the international law within the EU legal system should be our starting point. After all, human rights obligations both for the European Union and its Member States stem from there. The EU, whilst pursuing its external human rights objectives, moves within the realm of international law, yet at the same time, within the European constitutional setting. This makes us reflect upon the architecture of this multi-layered legal space, and the position of values EU holds as fundamental for its existence. Let us deal with the two issues in turn.

¹³⁶ 道德經 Daodejing, Ch. 1, (transl. Gia-Fu Feng & Jane English (1972))

¹³⁷ This is not to say that there exist no attempts to discuss the EU human rights Policy in a more structured manner. See, for instance: Graíne De Burca, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union' 27 Fordham Int'l LJ 679, at 682-684 identifies the components of a coherent human rights system. There are three features thereof: (1) a catalogue of rights embedded in some sort of legislative document equipped with judicial or quasi-judicial mechanism; (2) monitoring; (3) effective mechanism (sanction or other) permitting bringing a violation to an end (provided that there is a proof of such serious violation). Such description of a human rights system corresponds to the international one, yet it does not provide information on how entities acting within the system should behave if they are to fulfil human rights objectives.

The relationship between the EU and international law had focused limited scholarly attention before 2008.¹³⁸ It is only after the *Kadi* judgement that these issues re-emerged in the doctrine¹³⁹ leading, importantly to reassessment of, *inter alia*, the old notions of dualism and monism of international law. Yet, the choice of looking at the position of international law within the EU legal order from this perspective indicates a deeper analysis – namely of assessing whether international law should be positioned within hierarchy of legal sources of EU law. Until 2008, the stance taken by the Court of Justice of the European Union and the primary text of the treaty seemed to indicate a monist approach. Article 216(2) TFEU states that Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. It goes in line with the standing jurisprudence of the Court confirming that international treaties are the ‘integral part of the Community law’¹⁴⁰ ranking between primary and secondary law¹⁴¹. This holds true also for customary law and international law of secondary nature.¹⁴² Such approach does not provide us with an information about the direct effect of provisions of international agreements which are decided on case-by-case basis by the Court. Generally, the Court tends to deny direct effect to provisions of those agreements which do not confer rights on individuals¹⁴³, and attempts at protecting the

¹³⁸ Ramses A. Wessel, ‘Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012), at 7 ff.

¹³⁹ The *Kadi* judgement of the Court of Justice of the European Union caused the rise in the scholarly attention towards the interaction between the international and European law. For the sample of scholarly analysis produced as the result, please see: Laurence Burgorgue-Larsen and others (eds), *Les interactions normatives : droit de l’Union européenne et droit international* (Pedone 2012) Janne Elisabeth Nijman and Andre Nollkaemper, *New perspectives on the divide between national and international law* (Oxford University Press 2007), Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International law as law of the European Union* (Martinus Nijhoff Publishers 2012). For the earlier analysis, see: Vincent Kronenberger, *The European Union and the international legal order : discord or harmony?* (T.M.C. Asser Press 2001).

¹⁴⁰ *CJEU, Case C-181/73 Haegeman v. Belgium* [1974] ECR 449.

¹⁴¹ *CJEU, Case C-179/97 Spain v Commission* [1999] ECR I-1251; *CJEU Case Racke GmbH & Co v Hauptzollamt Mainz* [1998] ECR I-3655, at para. 45.

¹⁴² See for instance: *CJEU, Case 192/89 Sevince v Staatssecretaris van Justitie* [1990] ECR I-3461. Association Council decisions will be the subject of our enquiry at the later stage in this study.

¹⁴³ See, in particular: *Biret* set of cases (albeit interpreted in a classically international manner): CFI, Case T-174/00 *Biret International SA v Council* [2002] ECR II-00017; CFI, Case T-210/00 *Etablissements Biret et Cie Sa v. Council* [2002] ECR II-47; ECJ, Case C-93/02 P *Biret International SA v Council* [2003] ECR I-10497; ECJ Case C-93/02, *Etablissements Biret et Cie Sa v. Council* [2003,] ECR I-10565; ECJ, Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura and Others* [2005] ECR I-02579; ECJ, Case 344/04 *The Queen, on the application of International Air Transport Association (IATA) and European Law Fares Airline Association (ELFAA) v Department for Transport* [2006] ECR I-403; ECJ, Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057. For comments, see: Enzo Cannizzaro, ‘The Neo-Monism of the European Legal Order?’ in Enzo Cannizzaro, Paolo Palchetti and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012), at 45-49.

discretion of agreements' enforcement¹⁴⁴. This seems to be confirmed through *Kadi*, yet even there, the interpretations of Court's position have been extremely varied.¹⁴⁵

What remains a fact, however, is that it is the Union that shapes the relationship between its own legal system and international law. More concretely, it is the Court that sieves the international law elements through the EU's intrinsically complex legal system assessing objectives, interests, and needs. In the words of AG Maduro Opinion in *Kadi*, the relationship between EU and international law 'is governed by the Community legal order itself, and international order can permeate the legal order only under the conditions set by the constitutional principles of the Community'¹⁴⁶. Subsequently, the Court set the limits of how this filtering effect could go – namely as far as constitutional principles of the legal order –

¹⁴⁴ See, in particular, the case law concerning the GATT 1947 and subsequent WTO agreements: ECJ, Case C-104/81 *Hauptzollamt Mainz v C. A., Kupferberg & Cie KG a.A.* [1982] ECR 3641, ECJ, Case C-149/96 *Portugal v Council of the EU* [1999] ECR-I8395 at 44-45, ECJ, Case C-377/02 *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465. Court's approach is sometimes analysed from the perspective of reciprocity international agreements guarantee. See, for instance: *ibid*, at 39 – 58. 'The logic of domestic implementation would be subverted if the content of international rule were determined in the abstract, on the basis of the content that lawyers can extract from certain international provisions. This logic would be much more respected by contextualizing international rules to govern the conduct of their addressees. The case law of the ECJ on the WTO Agreements is an excellent example of this. The earlier case law of the Court, though in unclear terms, tended to convey the idea that the normative content of the provisions of these agreements could not be determined only on the basis of their wording, however clear and precise, but rather had to be revealed through ongoing process of diplomatic intercourse. Domestic implementation, therefore, ought to interfere with this idiosyncratic process of lawmaking. It should not bestow domestic normativity upon international rules but rather respect their indeterminate nature and avoid superimposing judicial enforcement upon provisions whose content must still be determined at the international level.' *ibid*, at 52. For more on the issue, see: Marco Bronckers, 'From "direct effect" to "muted dialogue" : recent developments in the European courts' case law on the WTO and beyond ' 11 *Journal of International Economic Law* 885, Dordi Claudio, *The Absence of Direct Effect of WTO in the EC and Other Countries* (Centro interuniversitario sul diritto delle organizzazioni internazionali economiche CIDOIE 2010) Enrico De Angelis, 'The effects of WTO law and rulings on the EC domestic legal order : a critical review of the most recent developments of the ECJ case law' 15 *International trade law & regulation* 88, Pieter Jan Kuijper and Marco Bronckers, 'WTO Law in the European Court of Justice' 42 *Common Market Law Review* 1313.

¹⁴⁵ For samples of varied reactions to *Kadi*, see: Jean d'Aspremont and Frédéric Dopagne, 'Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders' 5 *Int'l Org L Rev* 371 Besson, 'European Legal Pluralism after Kadi' Deirdre Curtin and Christina Eckes, 'Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe, The' 5 *Int'l Org L Rev* 365 Griller Ramses A Wessel, 'Introduction to the Forum-The Kadi Case: Toward a More Substantive Hierarchy in International Law' 5 *Int'l Org L Rev* 323 Steven Blockmans and Ramses A Wessel, 'The influence of international organisations on the EU and its legal order: between autonomy and dependence' in *Between Autonomy and Dependence* (Springer 2013), Larik, *op. cit*.

¹⁴⁶ ECJ, Opinion of AG Maduro, *CJEU, Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, para. 21. Similarly, see the comparison used by d'Aspremont and Dopagne where the 'relation between European law and international law is governed by European law to the same extent as the relationship between municipal law and international law is governed by municipal law.' See: d'Aspremont and Dopagne, at 373, as cited by: Wessel, at 29.

such as human rights or rule of law.¹⁴⁷ Some authors call this approach a neo-monist one¹⁴⁸, yet I would be more inclined to follow von Bogdandy in deeming the distinction between monist and dualist approaches as archaic and irrelevant.¹⁴⁹ Possibly, concurring with his pluralist approach¹⁵⁰ would explain some of the criticisms of the EU human rights policy.

It seems, however, that the EU external human rights policy is an interesting example for the enforcement of an ideal of international constitutionalism.¹⁵¹ Whilst acting in this area, the EU reinforces the set of values it 'shares' with third countries, thus limiting the possibility of creating conflicting situations. This follows the de Búrca's explanation¹⁵² of international constitutionalism built on similar one advocated by de Wet¹⁵³ and Petersmann¹⁵⁴. De Búrca,

¹⁴⁷ CJEU, *Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission*, at para. 285.

¹⁴⁸ Cannizzaro.

¹⁴⁹ Armin Von Bogdandy, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' *International Journal of Constitutional Law* 397, at 400.

¹⁵⁰ On discussions of international legal pluralism see: Paul Berman, 'Global legal pluralism' 80 *Southern California Review*, Paul Berman, 'Federalism and international law through the lens of legal pluralism' 73 *Missouri Law Review* Armin Von Bogdandy, 'Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law' 6 *International Journal of Constitutional Law* 397 Alec Stone Sweet, 'Constitutionalism, legal pluralism, and international regimes' 16 *Indiana Journal of Global Legal Studies* 621 Paul Schiff Berman, *Global legal pluralism: a jurisprudence of law beyond borders* (Cambridge University Press 2012), Nico Krisch, 'The Open Architecture of European Human Rights Law' [Wiley on behalf of the *Modern Law Review*] 71 *The Modern Law Review* 183 Nico Krisch, 'The pluralism of global administrative law' 17 *European Journal of International Law* 247 Brian Z Tamanaha, 'Understanding legal pluralism: past to present, local to global' 30 *Sydney L Rev* 375 M Maduro, 'Three Claims of Constitutional Pluralism' *Constitutional Pluralism in the European Union and Beyond* 67 Matej Avbelj and Jan Komárek, *Four visions of constitutional pluralism* (Cambridge Univ Press 2008) Marco Goldoni, 'Constitutional pluralism and the question of the European common good' 18 *European Law Journal* 385 Besson, 'European Legal Pluralism after Kadi' Matthias Kumm, 'Constitutionalism and experimentalist governance' 6 *Regulation & Governance* 401. In addition, according to the explanation provided by Walker, constitutional pluralism recognises that the European Union has developed beyond the confines of traditionally accepted notions of international law resulting in the EU making similar claims to states. As a consequence the order has changed from vertical to horizontal, demonstrating hierarchical quality. See: Neil Walker, 'The idea of constitutional pluralism' 65 *The Modern Law Review* 317, at 27.

¹⁵¹ On the notion of international constitutionalism within the European Union context, see for instance: Antje Wiener, *Pluralist Cosmopolitan and Public Reason-Oriented, Global Constitutionalism: Mapping an Emerging Field* (2011) Erika De Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalism?' 5 *European Constitutional Law Review* 284 De Burca on general issues of international constitutionalism: Jan Klabbers, Anne Peters and Geir Ulfstein, *The constitutionalization of international law* (Oxford University Press 2011) Erika De Wet, 'The International Constitutional Order' 55 *International & Comparative Law Quarterly* 51.

¹⁵² De Burcaat, at 40 and following.

¹⁵³ This follows de Wet's argument according to which there exists a 'hierarchical superior value system across different regimes (whether domestic, regional, functional) [which can] reduce the potential for inter-regime normative conflict.' De Wet, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalism?' at 288, as quoted by Wessel at 25.

¹⁵⁴ See for instance: Ernst-Ulrich Petersmann, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society' 20 *Mich J Int'l L* 1, Ernst-Ulrich Petersmann, Harvard Law School. Jean Monnet Chair. and Jean Monnet Program., *Time for integrating human rights into the law of worldwide organizations* :

in opposition to 'strong' constitutionalists¹⁵⁵, advocates a 'soft' approach where there exists no rigid hierarchy of rules. Instead in this arrangement, a set of commonly negotiated, shared principles would underlie a constitutionalist system. She proposes three characteristics of such system: the existence of a community of some kind, a focus on universalizability and emphasis on common norms or principles of communication for addressing a conflict¹⁵⁶. The 'soft' constitutionalist approach in its emphasis on negotiation and ownership of the system of values resembles new governance theories contributed to heavily by de Búrca in her earlier work¹⁵⁷ which can serve as an inspiration for the EU external human rights policy.

In the light of the above, it could be claimed that due to the initial lack of competence in the area, the internal development of fundamental rights policy followed necessarily pragmatic pluralist logic. At the same time, the external human rights policy followed the international constitutionalist logic. The Treaty of Lisbon altered the landscape bringing the two aspects of the policy 'home'. The ideology underlying the two is uniform – both from the point of the common standards the EU, its Member States, and third countries – collaborators - are to follow, and the purpose they are to serve – collaboration, promotion of economic development and wellbeing of the peoples, and ultimately peace. The European Union through pursuing its human rights policy together with other external relations objectives creates the comprehensive framework by making sure that the direction all actors involved follow is the same and eliminating the potential conflicts from the outset. This way of framing external relations has been considered since 1989 and is connected with international law (and international law scholarship) renouncing the politically indifferent vision of international law.¹⁵⁸

lessons from European Integration Law for Global Integration Law (Harvard Law School 2001) Ernst-Ulrich Petersmann, 'Constitutionalism and International Organizations' 17 Nw J Int'l L & Bus 398 and more recently: Ernst-Ulrich PETERSMANN, 'Human rights require 'cosmopolitan constitutionalism' and cosmopolitan law for democratic governance of public goods'.

¹⁵⁵ The distinction between 'strong' and 'soft' constitutionalist after Wessel, see: Wessel at 26.

¹⁵⁶ De Burcaop. cit. at 39.

¹⁵⁷ Amongst many others, see above all: G. De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006), Joanne Scott and G. De Búrca, *Constitutional change in the EU : from uniformity to flexibility?* (Hart 2000).

¹⁵⁸ Susan Marks, *The riddle of all constitutions : international law, democracy and the critique of ideology* (Oxford University Press 2000), at 37-48. She discusses the issue of the positive approach to democracy as a democratic norm thesis.

That, in turn implies, the invoking of the constitutional triad that the EU itself so gladly uses in its political documents and which has been endorsed since the Treaty of Maastricht by the EU treaty makers. Where there is constitutional spirit, there is also human rights, rule of law and democracy. This is a liberal vision of the state and international order functioning accepted by the Western world, or rather constructed in contrast to totalitarian regimes in the post-World War II periods. And even though the liberal practice is lagging behind, the idea itself is definitely victorious.¹⁵⁹

This desirable and apparently correct approach to external relations is reflected in the general analysis of the EU role in global governance:

‘The EU is morally, politically and legally held to pursue equality amongst wealthy and poorer nations, to support their development and ensure ‘fairness’ between them, to pursue the sustainable management of global natural resources, and so on. In terms of methodology, the EU is to be guided by the principles which inspired its own creation and which it seeks to advance in the world: progressive development of multilateralism based on the rule of law as the preferred approach to conducting international relations. These provisions are the ‘external projection’ of an internal reality, namely that European integration itself has been progressively constructed through a variety of law-making processes.’¹⁶⁰

Hence, it is clear that the inspiration for the design of EU external relations, and external human rights lies in the values that the EU deems as fundamental for its own creation. It is, therefore, logical to assume that the ‘multilateralism based on the rule of law’ is the desired manner for the pursuit of EU external human rights policy. Defining the notion of the rule of law for this multilateralism will be, therefore, the next step in the current analysis. The task is difficult, as the rule of law resembles the Buddhist notion of Tao – it is extremely elusive and every single author writing on or in reference to the subject has his own vision thereof. In general terms, the rule of law encompasses two propositions: ‘(1) that the government ought to rule by law (“ruled by laws, not by men”), and (2) that to achieve this objective, laws must meet certain formal conditions relating to practicability and certainty.’¹⁶¹

Rule of law benchmarks in this context are considered, therefore, as means to an end. It is not my purpose to approach rule of law as yet another value that is to be promoted by the

¹⁵⁹ The statement on liberal ideology accepted by the Western democracies, see: Francis Fukuyama, *The end of history and the last man* (Hamish Hamilton 1992), chapter 4, in part. at 45. The analysis of the constitutionalism and its impact on international law, see: Marks, chapter 2.

¹⁶⁰ Van Vooren, Blockmans and Wouters, Introduction.

¹⁶¹ David Haljan, ‘Chapter 16 - Is the Rule of Law a Limit on Popular Sovereignty?’ in Erik Claes, Wouter Devroe and Bert Keirsbilck (eds), *Facing the Limits of the Law* (Springer 2009), at 278.

European Union in external relations (although the mere fact that the EU abides by it inasmuch as it is expected to do so by its internal rules, could be considered as a part of such analysis).¹⁶² It is irrelevant, for our search whether the EU has given a deeper thought to the notion of rule of law.¹⁶³ Its constitutionalized legal system permits for a general (albeit far-fetched) assumption that in its internal dealings the EU institutions rule by law; and the laws comply with the formal criteria enshrined in the Treaty. This is the guidance the EU is to follow in its external relations, and I will assume it as a suggestion as to the model the EU external human rights policy is based on.

¹⁶² Here, yet again Andrew Williams applies to rule of law a similar measure as that of his 'ironic' study of human rights policy. Rule of law as a value encompassed in the ethos of Europe is subject to more or less the same criticism and gives rise to similar questions: 'The EU purveys a notion of the rule of law in its external dealings, particularly in development, trade and accession policies. It is represented as a paragon of virtue when it comes to fulfilling aspects of the rule of law and promotes many projects associated with developing the ability of third states to adhere to the rule of law. But the apparent incapacity of the EU to exercise any value control over its Member States on rendition suggests an ironical distance between the external and internal adherence to this concept. Does the export of this idea, then, reflect something of the internal understanding? Or does it demonstrate the relative lack of application internally by comparison?' Williams, *The ethos of Europe : values, law and justice in the EU*, at 72.

¹⁶³ Again Williams complains against the background of the AFSJ about the lack of internal reflection by the EU as to what the notion of rule of law means: 'Indeed, the difficult areas of justice and home affairs, and foreign policy, demonstrate how the EU legal system has had to accept ambivalence towards a rule of European law as an inherent condition. This is not simply a product of a split between the EU and EC law. As we have seen with the justice and home affairs matters, key aspects of a sophisticated understanding of the rule of law remain absent.' *ibid*, at 85.

II. The Rule of Law for the EU External Relations?

The criticisms outlined in Chapter 1 reflect the desirable architecture of the model human rights policy defining rights of individuals and obligations of EU as a duty bearer. The criticism about the mere pursuit of the objectives of the policy both in internal and external realm amounts to the call for legitimacy of the policy which is to be rooted in the primary law of the European Union. Various dimensions of incoherence correspond to the demand that the policy is to be envisaged as a one harmonious whole. It needs to be equally present in the internal and external sphere, as only this way can it be considered transparent and legitimate. Furthermore, the rules characteristic for the human rights policy in the external realm need to be applied in the same manner to all the affected countries, hence they need to be predictable. Finally, these should be non-conflicting with other policies' rules and applicable on equal terms to all of them.

In claiming incoherence, all of the above described criticisms and the characteristics of the model external human rights policy share one more underlying feature. The objects of the critique are procedural safeguards of the policy. It is to be pursued according to the rules that lie at the basis of the European Union policies in abstract terms referred to as the rule of law principles. According to the commentators, therefore, the European Union, when creating the human rights policy instruments is to give due consideration to the rule of law.¹⁶⁴ In other words, it is to follow possibly an over-simplistic¹⁶⁵, but useful notion of a 'good legislator' and a 'good enforcer' paradigm not only internally, but even more so externally. There, the traditional internal legal system safeguards do not apply – there is no legal authority to judge the Union if it does not 'uphold and promote' human rights; there is no court to protect individuals whose rights are harmed as the result of EU external action.

¹⁶⁴ See for instance: *ibid* Andrew T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law' 29 *Oxford Journal of Legal Studies* 549.

¹⁶⁵ Simplistic, as if we accept the claim that the international legal system is becoming more and more fragmented, then, in Martti Koskenniemi and Paivi Leino's terms 'the crisis of domestic sovereignty is paralleled by the collapse of the image of the international world as a single, hierarchical structure at the top of which the United Nations governs a world of tamed sovereigns through public law and diplomacy. The new global configuration builds on informal relationships between different types of units and actors while the role of the state has been transformed from legislator to facilitator of 'self-regulating systems.', in: Martti Koskenniemi and Paivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' 15 *Leiden Journal of International Law* 553, at 557.

The demand for the European Union to behave as a 'good legislator' and a 'good enforcer' is complements the core for this work demand the European Union should have the human rights policy since the two complement one another, together with the third element of the EU constitutional triad – democracy. That the EU acts in line with the rule of law standard seems to be one of the most obvious things, though it should be possibly justified further in the three fold manner.

Firstly, the question about motives appears. Why it is the EU and not other actors that is to abide by the high standard of rule of law? Undeniably, it is the European Union and its institutions that set the standard in relations with third countries by, though not merely, being a stronger economic power, providing thus the tangible incentive to the broadly understood cooperation. In addition to the above, it is also the European Union institutions that for the sake of its internal legitimacy have insisted on enhancing the focus on human rights' presence in its foreign and internal policy instruments.¹⁶⁶ The task was completed by the Court of Justice of the European Union that 'imported' the principles of human rights regime into its case law from the legal systems of the EU Member States.

Secondly, we need to answer the question as to the chief characteristics of a good legislator. In the external policy sphere, the context in which the European Union is functioning is that of international law. Therefore, what first is required of a good legislator in the international law context is adherence to the rules and values underlying the international law. Furthermore, the ultimate product of the good legislator's activity needs to abide also by internal rules of the legislator. Similarly we would be speaking of a national Parliament which needs to act according to its own rules of procedure. Obviously, this comparison is very superficial, yet it serves the purpose of demonstrating that, theoretically, the European Union is subject to two sets of obligations stemming from the internal and external sphere corresponding to two different sets of values underlying the two different legal regimes.

Thirdly, the regard needs to be paid to the observed importance of human rights protection as a necessary condition for the international rule of law.¹⁶⁷ It is emphasised in the literature

¹⁶⁶ See above: Chapter 1, section: From No Provisions on Human Rights to Treaty of Lisbon, at 33.

¹⁶⁷ Tom Bingham, 'The Rule of Law in the International Legal Order' in Robert McCorquodale (ed), *The Rule of Law in International and Comparative Context* (British Institute of International and Comparative Law 2010), at 7.

that the underlying values manifested by human rights are universally shared, and though relatively recent in their development, have been repeatedly acknowledged by international legal bodies as of highest importance. The United Nations Security Council made the express reference to the rule of law in 1996 in its resolution and has continued to do so ever more frequently since.¹⁶⁸ The similar trend could be observed in the case law of the European Court of Human Rights which since 1975¹⁶⁹ has been consciously and consistently developing the link between the two values. Finally, the realm of international human rights protection is an area of international law where the role of the courts is prominent, as is that of individual claimants making it a more advanced international legal environment than that of inter-state relations characteristic for international law realm. Thus, the EU as a good legislator should take the intrinsic inter-locking between the rule of law and human rights into consideration.

In the end, however, the picture of the EU – a good legislator and good enforcer, as painted by the critics, is more complex than the sole determination that the EU is subject to external and internal obligations (and pressures) when it is pursuing its external human rights policy. It seems, that they evaluate the EU external human rights policy predominantly from the point of view of the internal standards, or some sort of mixed internal-external standard demanding of it to act beyond every other entity existing in the international sphere. The standard they expect to be present in the EU external human rights policy seems to be that of the principles of the rule of law; seemingly the same that applies to the internal sphere. The critiques do not specify which standard applies to the European Union, neither do they refer to a possible meta-form particular for an international organisation of unusual type. Instead, they provide a check-list of concrete actions to be undertaken for the external human rights policy to be regarded positively rather than in an ironic manner. This somewhat *ad hoc* criticism gives the impression that even on the part of the critics, there exists no clear vision as to what would be the expected shape of the external human rights policy (or its internal counterpart).

Yet, at the same time it seems that each of the critiques departed from an implied assumption that the policy at stake needs to fulfil some sort of a standard. They clearly

¹⁶⁸ Simon Chesterman, 'An International Rule of Law' 56 American Journal of Comparative Law, at 348.

¹⁶⁹ ECHR, Case *Golder v United Kingdom* (1975), Appl. No 4451/70, para 54.

evaluate it within a uniform constitutional framework guided by the set of pre-determined principles. The trouble is that none of the commentators reflected on what those pre-determined principles are, or could be in the normative perspective. Given the Treaty projected design of the European Union the standard could be searched for within the quasi-constitutional provisions ruling EU policies' frameworks. Yet, the human rights policy of the EU neither in its internal, nor in its external aspect, had been extensively provided for by the Treaty.¹⁷⁰ This means that the assumed standard we are looking for must be of more general nature, underlying the structure of the European Union. Democracy, human rights and the rule of law values have been granted the foundational status within the legal system of the Union, and so give the hint as to where to begin the search. This is the standard to which all the policies must comply, including the external human rights policy of the Union; this is the ultimate system of the control of the institutions. Ultimately, if the European Union as a good legislator is to adhere and actively create the rule of law, the concept itself must be meaningful; preferably it should consist of the set of the benchmarks which the activity of the European Union should be tested against. The possibility to test the policy actions against a set of benchmarks is, in fact, one of the most favourite strategies of the European Union in dealings with third states.

Much has been written about the instrumental use of the value and the vulnerability of the process.¹⁷¹ From the point of view of this study, however, we are more interested in unfolding the perspective from which other policies may be evaluated.

The search will start off with the prevalent theories advocated by various theorists of law, and move to the notion inconsistently developed by the Union in order to determine the elements which are present in the EU self-reflection and those that are still missing.

¹⁷⁰ Reasons for this can be traced back in the development of the incorporation of the human rights policy into the EU legal framework.

¹⁷¹ See: Neil Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009), at 119 – 138. He determines what is meant by the 'necessities mixed virtue' in the following terms: '(...) the rule of law suffers from a twofold vulnerability in these circumstances. In the first place, as already briefly intimated, the centrality and diversity of contribution of the rule of law to the EU polity-in-the-making is to some extent a function of the weakness of other traditional media of common community – both political and cultural – at supranational level. In the second place, and exacerbating the first difficulty, because the rule of law's own efficacy and legitimacy in some measure depends upon the kind of fertile environment in which these other media thrive, then just where more is demanded of it, it may in fact, be less well placed to deliver. (...) The more indispensable the rule of law becomes to certain tasks, the more inadequately equipped it can appear.' See also: Francis Geoffrey Jacobs, *The sovereignty of law : the European way* (Cambridge University Press 2007), Mattei and Nader, op. cit.

Subsequently a check-list will be elaborated which will allow for examination of the external human rights policy from the internal constitutional perspective and the external international law one. The list of the benchmarks thus elaborated will be a guiding tool in the subsequent analysis of the EU operation taking place within the constraints (also the governance ones) of its internal legal system and that determined by international law.

In the end, what is needed from the point of view of the European Union and its commentators, is to find such a conception of rule of law which can have its practical manifestation - which can be simply operational. Following the conclusions of Wennerström, it is not important what theoretical type of the conception one adopts. What matters is whether it is connected with an ambition to implement it.¹⁷² This ambition is demonstrated through creating such mechanisms that enable the attainment of objectives and respect for the values.

III. Which 'Rule of Law' for the EU?

*The Tao that can be told is not the eternal Tao; The name that can be named is not the eternal name.*¹⁷³ The rule of law concept in the framework of the legal system reminds very much of the Chinese philosophical notion of Tao – elusive as it can get, Tao is omnipresent, escaping definition for the purpose of maintaining universality. Similarly, there is not one universal and commonly agreed definition of rule of law, as if the supreme quality of this value was to be lost, should the concept become equivalent with one of possible theories. Alternatively, the multitude of understandings strips the concept of the meaning rendering it as a mere catchphrase abused by politicians, media, and scholars. Similarly to Tao, whoever addresses the concept, will perceive it differently. The comprehensive account of Hamara is very telling in this respect:

‘As Richard Bellamy and Joseph Raz have noted “some accounts of the ‘Rule of Law’ use the term as a catch-all slogan for every desirable policy one might wish to see enacted”¹⁷⁴. The term is frequently accused of having no determinate meaning. Waldron has called it an “essentially contested concept”¹⁷⁵ and Olufemi Taiwo has commented that “[it] is very

¹⁷² Erik O. Wennerström, ‘The rule of law and the European Union’ (Thesis (PhD), Iustus, Uppsala universitet 2007), at 44-45.

¹⁷³ 道德經 Daodejing, op. cit.

¹⁷⁴ Richard Bellamy, *Political constitutionalism : a republican defence of the constitutionality of democracy* (Cambridge University Press 2007), at 54.

¹⁷⁵ Jeremy Waldron, ‘Is the Rule of Law an Essentially Contested Concept (In Florida)?’ [Springer] 21 Law and Philosophy 137, at 137.

difficult to talk about the “Rule of Law” as there are people defending it”¹⁷⁶. According to some, the “Rule of Law” is a metric for evaluating whether or not there is law in a given society.¹⁷⁷ On other accounts, it is the quality of the law that is evaluated.¹⁷⁸ Some scholars suggest that to claim that the “Rule of Law” exists in a given society says nothing of the value of law in that society.¹⁷⁹ Some think that it is a value, albeit not a moral one,¹⁸⁰ whilst others regard it amongst the highest of political ideas.¹⁸¹ In fact, the only thing that seems to consistently garner *agreement* within “Rule of Law” discourse is that there is pervasive *disagreement* within “Rule of Law” discourse.¹⁸²

Furthermore, the concept's entanglement with other foundational notions of contemporary statehood (democracy, human rights)^{183, 184} and ruling power makes it even more elusive.¹⁸⁵

Nevertheless, as it is frequently observed, various conceptions share the common core, rendering at the same time the concept sufficiently abstract and flexible and in such a way a useful tool. The concept of the 'rule of law' coined in the 19th Century by Albert Venn Dicey¹⁸⁶ belongs to the English tradition of constitutionalism and is parallel to (though slightly different) the French *l'état de droit* and German *Rechtsstaat*.¹⁸⁷ Thus, the concept

¹⁷⁶ O. Taiwo, 'The rule of law: The new leviathan?' 12 Canadian Journal of Law and Jurisprudence 151, at 154.

¹⁷⁷ Matthew H. Kramer, *Where law and morality meet* (Oxford University Press 2004), at 172-222.

¹⁷⁸ John Finnis, *Natural law and natural rights* (Clarendon 1980), at 270.

¹⁷⁹ Kramer, at 172-222.

¹⁸⁰ Joseph Raz, *The authority of law : essays on law and morality* (Clarendon Press; Oxford University Press 1979), at 210-232.

¹⁸¹ Jeremy Waldron, 'The concept and the rule of law' 43 Georgia Law Review, at 1.

¹⁸² Courtney Taylor Hamara, 'The Concept of the Rule of Law' in Imer B. Flores and Kenneth Einar Himma (eds), *Law, Liberty, and the Rule of Law* (Springer 2013), at 12.

¹⁸³ The confusion is not only made by the politicians and the media; some scholars consider it to be absolutely justified. Bellamy, for instance claims that 'in many aspects the rule of law is simply rule by democracy'. See: Bellamy, at 53.

¹⁸⁴ At the same time, though inadequate in many aspects, the concept of statehood underlies the contemporary legal scholarship. It shall be used in this study as the basis of constitutional arrangements of state.

¹⁸⁵ See for instance Williams whilst searching for ethos of Europe thus justifies his methodological choices: 'On this premises I have chosen to excavate the institutional ethos through separate chapters on peace, the rule of law, human rights, democracy and liberty. It will be apparent, naturally, that these values are not wholly separable. Each infects and is infected by the others. It would be nonsensical to consider them in complete isolation.' Williams, *The ethos of Europe : values, law and justice in the EU*, at 15.

¹⁸⁶ Albert Venn Dicey and E. C. S. Wade, *Introduction to the study of the law of the Constitution* (10th edn, Macmillan; St. Martin's Press 1961)

¹⁸⁷ For the purposes of the analysis, dwelling into the different historically developed conceptions of the rule of law would be dangerous and thus will be limited to minimum. They have been associated with specific understanding of law and the conception of state characteristic for a given country. Just as the below outlined theories they also share common features. In the words of Wennerström:

'Terms such as *rule of law*, *Rechtsstaat*, *état de droit*, etc. have different backgrounds and carry different connotations in different legal cultures; nevertheless, these terms are often used and translated paying no concern to the associations that are – or are not – attached to them. In theory, it is possible to distinguish between an Anglo-American concept of rule of law – a concept that is not dependent on the existence of a state but which stresses the importance of courts and the subordination of authority under court jurisdiction – and a continental European, more Cartesian, concept of rule of law contained in the ideas of a *Rechtsstaat*, or

has become the basic value of the Western European democracies, and as such was transferred to the European Union legal system, crowned, subsequently as the common value.

This section does not attempt to provide a new definition of the rule of law, nor does it try to provide the unifying theory of all (as it might seem). Instead, it strives to determine a common denominator of the theories which could be used to decrypt what underlies criticisms described in Chapter 1. In short, in this section we seek to understand which qualities of the rule of law are to be visible in the external human rights policy of the EU?

In some aspects, the undertaken analysis of the Rule of Law in the context of evaluation of an/the EU policy refers back to the observation Jeremy Waldron made with reference to the American case study, where the “Rule of Law” (capitalised by the author to denote the abstract political ideal; not a concrete legal requirement) is an actual benchmark of legitimacy. This conclusion echoes and underpins some of the above-quoted scholars postulates referring to the need to legitimise the EU as a legal entity and, therefore, also its policies.¹⁸⁸

The search for the content of rule of law will follow three steps. Firstly, the brief outline of the most accepted theories of the rule of law will be presented, justified precedence given to one of the two prevailing trends. Secondly, the European Union approach to the rule of law in various contexts will be outlined and linked to some other emerging governance concepts. Finally, the list of benchmarks will be drawn and linked to the criticisms described in Chapter 1 bringing, possibly the final justification as to why it is that the Rule of Law provides and explicit theoretical framework for this study.

état de droit, which presupposes the existence of the state as a fundamental element and which describes the relation between private and public entities and the legal order. In a nutshell: the Anglo-American rule of law emerged from the courtrooms, whereas the continental European equivalent emerged from written constitutions.’ Wennerström, *op. cit.*, at 49-50. See also: Neil MacCormick, ‘Der Rechtsstaat und die Rule of Law’ 39 *Juristenzeitung*.

¹⁸⁸ See, as a sample classical accounts: Williams, *EU human rights policies : a study in irony* Alston and Weiler De Burca Diego J Linan Noguerras and Luis M Hinojosa Martinez, ‘Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems’ 7 *Colum J Eur L* 307 Bogdandy. In particular: the importance of EU Accession to the European Convention on Human Rights: Jacque Ian Manners, ‘The normative ethics of the European Union’ 84 *International Affairs* 45; for more recent accounts, see: Hartmut Behr, ‘The European Union in the legacies of imperial rule? EU accession politics viewed from a historical comparative perspective’ 13 *European Journal of International Relations* 239 Furio Cerutti and Sonia Lucarelli, *The search for a European identity: Values, policies and legitimacy of the European Union* (Routledge 2008).

1. Categorisation of Rule of Law Theories - Formal or 'Thin' theories v Substantive v 'thick' theories of the Rule of Law

The first step in the analysis of what constitutes the rule of law is the distinction between the two major trends – Paul Craig referred to them as to formal and substantive conceptions of the rule of law¹⁸⁹, Tamanaha basing on this classification referred to them as to 'thin' and 'thick' theories.¹⁹⁰ Craig explains the distinction in simple terms stating that formal theories address the manner in which the laws are promulgated, the clarity of norms, and the temporal dimension of a norm, whilst substantive ones go beyond the doctrine in as much as they involve the value judgement on whether we are speaking of 'good' or 'bad' laws.¹⁹¹

The prevalent thin theories of the rule of law are those of Dicey, Hayek, Fuller and Raz (for short description of each of them – see below), whilst amongst the 'thick' ones the most well-known ones are that of Dworkin (inherently connected with his concept of law)¹⁹² and the more contested ones of Sir John Laws¹⁹³ and Trevor Allan¹⁹⁴. In making this classification Craig underlines that the basic difference stems from various conceptions of 'law' that are assumed for respective theories, predominantly agreeing on the formal core of the rule of law concept.¹⁹⁵ The need for incorporation of 'right' approaches into the concept of the rule of law is connected with frequent criticism according to which adherence to the formal rule of law theories would render legal also the totalitarian systems had they fulfilled the basic formal requirements of the rule of law. This critique has encouraged the search for the mid-way in the theorisation of the concept. Amongst others, Joseph Raz's in his later work

¹⁸⁹ P. Craig, 'Formal and Substantive Conception of the Rule of Law: an Analytical Framework' Public Law, op. cit.

¹⁹⁰ Brian Z. Tamanaha, *On the rule of law : history, politics, theory* (Cambridge University Press 2004), at pp 91 ff. In the range from the 'thinnest' to 'thickest' theories he distinguished: (1) the 'rule-by-law' (law as instrument of government); (2) 'formal legality' (law that is general, prospective, clear, certain); (3) the thicker of thin theories – 'formal legality' with the added democracy. The 'thick' conception share the common core of the formal theories and focus additionally on other features: (4) 'individual rights' (property, contract, privacy, autonomy); (5) 'rights of dignity and/or justice'; and the 'thickest' of conceptions including (6) 'social welfare' (substantive equality, welfare, preservation of community). For another overview of the history and criticism of the concept, see: Emilio Santoro, Pietro Costa and Danilo Zolo, *The rule of law: history, theory and criticism*, vol 80 (Springer 2007).

¹⁹¹ Craig, at 467.

¹⁹² R. M. Dworkin, *Law's empire* (Fontana 1986) R. M. Dworkin, *A matter of principle* (Clarendon Press 1986).

¹⁹³ Sir John Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' Public Law Sir John Laws, 'Law and Democracy' Public Law, Sir John Laws, 'The Constitution: Morals and Rights' Public Law.

¹⁹⁴ T. R. S. Allan, *Constitutional justice : a liberal theory of the rule of law* (Oxford University Press 2001).

¹⁹⁵ Craig, at 487.

developed the concept of 'principled adjudication'¹⁹⁶ which took his formal theory in the direction of substantive one, thus pointing to the need of value loaded action on the part of the judiciary.

From the perspective of the analysis of the European Union policy, however, this distinction (and the underlying assumption of the basic conception of law) does not contribute to focusing the image; it rather blurs it. As Raz stated, the rule of good law renders the conception of the rule of law useless – it deprives it of its analytical quality. He insists that the rule of law is to be regarded as just one of the qualities on the basis of which a legal system may be judged.¹⁹⁷

Raz's theory provides also the basic explanation why the rule of law should be perceived from the 'thinner' perspective, by insisting that the concept of the rule of law is one of the series of virtues and should not be confused with them. Amongst those virtues he lists: democracy, justice, equality, human rights of any kind or respect for persons or for the dignity of men.¹⁹⁸ Paul Craig unpacks the condensed statement by Raz in the following way:

'What Raz is getting at here can be explained quite straightforwardly. We may all agree that laws should be just, that their content should be morally sound and that substantive rights should be protected within a society. The problem is that if the rule of law is taken to encompass the necessity for "good laws" in this sense then the concept ceases to have any useful independent function for the following reason. There is a wealth of literature devoted to the discussion of the meaning of a just society, the nature of the rights which should subsist therein, and the appropriate boundaries of governmental action. (...) To bring these issues within the rubric of the rule of law would therefore have an effect of robbing this concept of any function *independent* of such political theories. Laws would be condemned or upheld as being in conformity with, or contrary to, the rule of law in this substantive sense when the condemnation or praise would simply be reflective of attachment to one particular political theory.'¹⁹⁹

'Going beyond' the formal doctrine of the rule of law, makes us enter into the realm of such 'essentially contested concepts' (and as observed by Wennerström conceptions thereof²⁰⁰) as human rights and democracy, which at their core coincide with the rule of law and overlap in meaning. As it has already been pointed to, in the context of the European legal

¹⁹⁶ Joseph Raz, *Ethics in the public domain : essays in the morality of law and politics* (Clarendon Press; Oxford University Press 1994).

¹⁹⁷ Raz, *The authority of law : essays on law and morality*, at 211.

¹⁹⁸ Joseph Raz, 'The Rule of Law and Its Virtue' 93 *The Law Quarterly Review*, at 196.

¹⁹⁹ Craig, at 468.

²⁰⁰ Wennerström, at 45-46.

system, rule of law, sided with democracy and human rights, has been regarded as the underlying value, common for the Member States. In addition to this, since the Treaty of Rome, it has been considered as the bulk term for the legality of legal acts of the European institutions. And in subsequent development of the 'integration by law' approach, it was clearly placed as the concept instrumental for integration – following Waldron's argumentation – indispensable for integration for the lack of political tools and in absolute need of being accompanied by other values:

'For Waldron, the focal concern of the rule of law considered as a solution-concept, from Aristotle through Hobbes and Dicey to Hayek, is *'how can we make law rule?'*²⁰¹. And, indeed, the various particular regulatory aspirations which we tend to find collected under the rule of law – certainly defined in a 'narrow'²⁰² or 'thin'²⁰³ sense as a minimum over which we can all agree or at least over which there is significant overlapping consensus – invariably speak to this particular concern and how we might approximate the satisfactory answer. They speak, in other words, to the possibility of *'law being in charge in a society'* in terms which contrast the rule of law favourably with the arbitrary, 'rule of men'.²⁰⁴

In the present study we are looking in fact for more than such overlapping consensus. We are asking: *How can we make law rule within an external policy context?* Or in a more detailed manner: *Which qualities must the external policy possess for it to be coherent with a rule of law as a value enshrined in the Treaties and advocated by the commentators?* What is necessary for the sake of the analysis, is thus the focus on the rule of law as presented formally, as this is the basic core of all theories searched for in more or less conscious manner by scholars analysing various policy fields. In addition, the focus on the formal conceptions of the rule of law is also the favoured one in the analysis of the externalisation of the term to the international plane.²⁰⁵ What will follow is the short account of what conceptions of 'thin' rule of law concept have been developed across time with a view of identifying sufficiently detailed common threads that can be later searched for in the EU practice and mapped against the postulates concerning the external human rights policy.

²⁰¹ Tamanaha, Chapter 7; Cited in: Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue' at 121.

²⁰² Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 Southern California Law Review, cited in: Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', at 121.

²⁰³ Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' cited in: Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', at 121.

²⁰⁴ Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', at 121.

²⁰⁵ Matthias Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' 44 Virginia Journal of International Law.

2. Thin Theories of the Rule of Law

The commentators of thin theories of the rule of law emphasise the two aspects thereof which will be examined in this section. Firstly, they emphasise the generic root of dinosaur Dicey's theory. Secondly, they point to common core of all the theories.

For 19th Century work of Dicey the rule of law had three characteristics. The first one lied in contrasting the 'system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.' Thus any form of restriction of an individual's rights can only follow the ordinary legal procedure before the ordinary courts.²⁰⁶

The second component is that of equality of all before the law. The third component, highly disputed one, pertains to the claim that the common law system is better equipped to ensure rule of law to its citizens. Dicey points to the fact that the level of protection of individuals' rights is the product of a long process of adjudication and is not threatened by the whim of a legislator that could be the case in the continental system of law. The third of Dicey's conditions amounts to the requirement that the law creates sufficiently stable environment resulting from a long-term process (in this case adjudicative one). Thus, the foundations of the formal conception of the rule of law are based on the prevalence of law over arbitrary power, equality, and the stability of the system.

Friedrich Hayek, writing in the post-World War II period specifies the rule of law conditions in the following manner: 'The government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to see with fair certainty how authority will use its coercive powers in given circumstances on the basis of this knowledge'²⁰⁷. The emphasis on certainty and predictability of the system refer to the Hayek's predominant theme of interest – that of free economy which needs to be functioning within a preset rules creating favourable environment for the thriving of free market.

²⁰⁶ Dicey and Wade, at 188.

²⁰⁷ Friedrich A. von Hayek, *The road to serfdom* (Routledge and Kegan Paul 1976) at 72, quoted in: Charles Sampford, 'Reconceiving the rule of law for a globalizing world' in Spencer Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005) at 14.

Fuller²⁰⁸, on the other hand devises eight virtues which are characteristic for law and which make up the rule of law.²⁰⁹ In order to extract them, he uses the parable of the king (*Rex*) who attempts to make law for his subjects but fails completely eight times because he: (1) tries to make particular rules for each and every person serving his or her particular needs; (2) does not announce them or publicize in any other way, therefore, nobody knows which rules to follow; (3) foresees the retroactivity of his rules; (4) makes rules which are difficult to understand and ambiguous; (5) makes rules which contradict one another; (6) enacts rules which cannot be followed; (7) applies the rules in an inconsistent manner; (8) alters the rules too frequently for his subjects to be able to rely on them.

Thus, according to Fuller, through negative reasoning we arrive at rules which should be (1) general; (2) public; (3) prospective; (4) clear; (5) non-contradictory; (6) compliant; (7) consistently applied; (8) reasonably stable.

Finally, we move to the most elaborated theory of Joseph Raz which was built on the 8 principles of law identified by Fuller. Raz's theory provides also the basic explanation why the rule of law should be perceived from the 'thinner' perspective, by insisting that the concept of the rule of law is one of the series of virtues and should not be confused with them. Amongst those virtues he lists: democracy, justice, equality, human rights of any kind or respect for persons or for the dignity of men.²¹⁰

Craig refers to Raz's theory as a negative one just as Raz himself admits.²¹¹ Since the state by means of law may impose any sort of governance conditions on its citizens, the rule of law makes protects the latter from the abuses of the state by imposing specific rules of the law. The law, according to Raz²¹², needs to be (1) prospective, open, and clear; (2) relatively stable. Furthermore, Dicey's first component of the rule of law concerning the judiciary was made more specific. Raz states that (3) law making should be guided by open, stable, clear and general rules; (4) independence of the judiciary must be guaranteed; (5) principles of

²⁰⁸ Lon L. Fuller, *The morality of law* (Rev. edn, Yale University Press 1977) at 39 ff.

²⁰⁹ He focuses on the morality of law, which is later contested by Hart who claims that the eight principles identified by Fuller amount to efficacy of law. H. L. A. Hart, *Essays in jurisprudence and philosophy* (Clarendon Press; Oxford University Press 1983), at 33-38.

²¹⁰ Raz, 'The Rule of Law and Its Virtue', at 196.

²¹¹ Craig, at 468.

²¹² Raz, *The authority of law : essays on law and morality*, at 214-219.

the natural justice must be observed²¹³; (6) courts should have review powers; (7) courts should be easily accessible; (7) discretion of crime-policing agencies should not be perverted.

Thus, what we can conclude from the most common developments in the theory of the rule of law is that we are looking at three sets of principles. The first one concerns the quality of the law – it needs to be general, prospective, open, and clear. Second set of conditions concerns the conduct of authorities exercising the power. These entail principles of law making, standards of ensuring security which is portrayed as the general principle pertaining to the assumption that laws must be observed. The third set of principles is about the tools with which individuals in the domestic contexts are equipped in order to be able to exert the control over the authorities. Here, they need to have access to courts, which are to be adequately furnished with competence to perform the review. Whilst accessing the courts, individuals need to have legal protection (principles of natural justice which are to be observed). In other words, every single theory is telling us that the non-arbitrary legalistic authority which acts in a transparent manner, adopts but at the same time is subject to clear, prospective, general laws. The laws are applicable in the equal manner (individuals are in the same manner subject to laws). The control mechanism is accessible and consists in courts performing judicial review in pre-determined conditions guaranteeing that the review takes place in an independent manner, and rights of individuals in the process of the review are guaranteed.

Had the European Union been a state, and had we spoken about a policy within an internal domain of the authority of the structure, the above mentioned features would have sufficed for the conduct of the analysis. Yet, we are looking for criteria of evaluation of the external (human rights) policy, thus automatically we are entering the realm of international law. Furthermore, we are not speaking about a state – we are speaking about the European Union which throughout its existence has been developing successfully a new type of a legal order, with a particular, autonomous, characteristics. Thus, in order to determine what our benchmarks are, we need to consider also the impact of rule of law in international law, and the contribution by the EU itself to the value.

²¹³ Principles of natural justice fall under Article 6 of the European Convention for Human Rights – right to a fair trial.

3. The Rule of Law in International Law

As we have seen, conceptions of domestic rule of law are numerous. Theorists have been extremely prolific in determining what makes the exercise of power legal and what are the safeguards of the legal systems which are guided by the rule of law. Yet, the same notion in the realm of international law has remained undeveloped. Tamanaha, in fact, famously noted that whilst the conceptions of the rule of law applicable to domestic contexts have had a long history and grew to be established within the discourse on the statehood and underlying systemic values, the project of the rule of law in international law has just started.²¹⁴ Indeed, the globalisation processes and the development of the body of international law have changed the setting. It is more and more necessary to have an equivalent of the rule of law in the international context.

There is a number of arguments evoked in favour of the development of the rule of law in the international dealings. The first one concerns the proliferation of the areas of international law, or, in more general terms, areas which due to their trans-border implications required global regulation. Furthermore, together with the increase in the number of areas which underlie international legal regulation, the sovereignty of states (and particular legal orders) has been eroding. This process has been underlined by Jacobs²¹⁵ who in his analysis went even further claiming that the place of sovereignty is taken by the values and concepts around which legal systems concentrate. Importantly, Jacobs theory brings us to the final argument in favour of more vivid introduction and consolidation of a rule of law conception in the international law realm. Sampford indicated that 'separation of constitutional law and international law is breaking down'²¹⁶, and this is indeed true and connects well with Jacobs argumentation. It is stating the obvious – one could say.

Yet, despite stating the obvious the Rule of Law concept has a long way to go to the elevation of the concept from domestic to international level. And the elevation has gained a specific name – the rule of law is to be externalised²¹⁷. This term has been defined as 'the

²¹⁴ Tamanaha, *op. cit.*

²¹⁵ Jacobs, *op. cit.*

²¹⁶ Sampford, at 24.

²¹⁷ Contrary to 'internationalisation' as applied by national courts with reference to international law (similar to monistic doctrine of international law). For discussion of 'externalisation' and rule of law in international

process by which a feature characteristic that exists within the inside set is projected or attributed to circumstances or causes that are present in the outside space according to an internal-external dichotomous structure²¹⁸. 'Externalisation' is manifested by national courts directly applying international law thus contributing to the international rule of law – enhancing principles of access to courts and those of enforcement of law.

Externalisation of the rule of law concept into the external plain poses some obvious problems. The first one concerns the source of authority. As Arthur Watts²¹⁹ observes, in the international law realm instead of one legislator, there are many. These are states which are sovereign, and thus have wide discretionary powers that, if taken to extreme, may be arbitrary. The function of international rule of law is to curtail those discretionary powers which, given the vast and diverse body of international law rules, has been definitely happening.²²⁰ This should be easier as, following the reasoning of Jacobs and Sampford, international law has been taking on the specific characteristics of domestic systems.

If all of the above is true, the Raz's argument seems to be more convincing – it is the 'thin' conception of the rule of law that proves more useful for the analytical purposes.²²¹ It establishes clear criteria that should be followed in an international context; criteria that come in place of the concepts which hitherto have been determining the international law relationships and thus allowing for claiming legitimacy of international law as such. At the same time, the criteria adding to the practices provided for by international law rules, deliver a necessary regulatory minimum coming into place of the eroded sovereignty, whilst leaving its remaining part almost intact.

Again, we would apply the 'thin' theory of the rule of law to the pursuit of human rights objectives. Somehow, however, the commentators have been harmoniously claiming that the very protection of human rights is an indispensable component of the criteria. In other

law, see: Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model', op. cit.

²¹⁸ Stephane Beaulac, 'The Rule of Law in International Law Today' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009), at 204.

²¹⁹ Arthur Watts, 'The International Rule of Law' 36 *German Yearbook of International Law*, at 28.

²²⁰ This claim is made on the premise that international law is indeed law, and in this context the main problem is no longer the lack of sovereign but the compliance and legitimacy of international law. The discussion of externalization of the rule of law from domestic to international context constitutes the part of the debate on the latter.

²²¹ Sampford, at 26.

words, human rights are also one of conditions for the attainment of rule of law in the international sphere. Tamanaha reverts the reasoning and brings us back to the 'core' of the concept:

'The rule of law, at its core, requires that government officials and citizens be bound by and act consistently with the law. The basic requirement entails a set of minimal characteristics: law must be set force in advance (be prospective), be made public, be general, be clear, be stable and certain and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.'²²²

Referring to criteria Tamanaha describes as to constitutional underpinnings, Zifcak²²³ enumerates the following elements of international rule of law: model-constitution of treaties to which the nations should strive; judicial review; effective mechanism for resolution of inter-party disputes; enforceability of decisions and judgements of courts and tribunals; incorporation of human rights which should 'inform and infuse the law governing the work of every international organisation exercising significant power and authority'²²⁴. David Kinley, on the other hand, separates the rule of law from human rights but emphasizes their inter-dependency and states that:

'Instead, my conclusion is that the rule of law on its own is not and will not be sufficient to provide even for minimal human rights protection. Still less can it be sufficient so long as the concept of human rights remains essentially contested in terms of nature, content and implementation, and so long as human rights share the globalization stage with economic actors. Where rules proclaiming human rights are supported by a broad, social, political and economic determination to promote them, rather than pulling themselves up by their own bootstraps, as it were, then the rule of law would truly facilitate their global promotion and protections. The necessity of this relationship is as true at any one instant as it is across time when the form, nature, and the circumstance of these supporting structures change.'²²⁵

²²² Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law' in Gianluigi Palombella and Neil Walker (eds), *Relocating the Rule of Law* (Hart Publishing 2009).

²²³ Spencer Zifcak, 'Globalizing the Rule of Law - Rethinking Values and Reforming Institutions' in Spencer Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005), at 38-39.

²²⁴ Ibid, at 39.

²²⁵ David Kinley, 'The universalizing of human rights and economic globalizatoin - What roles for the rule of law?' in Spencer Zifcak (ed), *Globalisation and the Rule of Law* (Routledge 2005), at 108.

Ultimately, as we can see even thickening of the rule of law conception requires determination of the formal components of the theory. From the earlier discussion, quoting after Stephen Beaulac²²⁶ we can extract three groups of rules (similarly as in case of Raz's theory). The first group is composed by rules pertaining to legal norms - adequate creation and application of norms, promulgation and publication; universality and sovereign equality²²⁷. The second group of rules refers to the system of accountability - adjudicative enforcement of rules normativity²²⁸; the existence of the Court of General Jurisdiction²²⁹, and the possibility of judicial review of all legal acts issued by international institutions²³⁰ in an independent and impartial manner. Finally, the third group of conditions of the rule of law refers to the conditions enabling the review and empowering the party that initiates the procedure – accessibility, though it is not clear whether we are speaking of the accessibility of the court for traditional international law actors, or the new ones – NGOs, or individuals.

As it is clear from the above brief analysis, the task of externalisation of the rule of law to the level of contemporary international law seems very difficult because of the characteristics of this area of law and its extreme fragmentation²³¹. It seems that within the traditional system with the rather uniform substantial composition and states as sole actors, rule of law would not even aspire to what it may be in the internal realm. The fragmented and fluctuating regime we have nowadays makes it difficult to determine to whom and to what extent the three groups of conditions apply.

Even in the context of human rights law perceived as the part of international law, we actually can speak of externalisation only to a limited degree. Despite claims for universality, even human rights regime is a very fragmented one, with various levels of accessibility of

²²⁶ Beaulac, op. cit.

²²⁷ Inasmuch we are speaking of equality before the law AND equality in participation in the creation of international normativity.

²²⁸ Which is facilitated through the development of various judicial and quasi-judicial bodies; and made at the same time more difficult because of the fragmentation of international law making it more difficult to attain stable and predictable conditions. See: United Nations. International Law Commission. Study Group., Martti Koskenniemi and Erik Castrén -instituutti., *Fragmentation of international law : difficulties arising from the diversification and expansion of international law* (Erik Castrén Institute of International Law and Human Rights 2007).

²²⁹ At the moment International Court of Justice cannot be classified as such because the jurisdiction is established on case by case basis.

²³⁰ At the moment, this condition is still not fulfilled. It is still not certain whether acts of the UN Security Council can be reviewed.

²³¹ On evaluation of fragmentation, see: Koskenniemi and Leino *ibid*, op. cit.

different actors. As Matthias Kumm observes, in fact, the contribution of internationalisation to the international rule of law depends very much on the area of the fragmented international law we are referring to.²³²

In fact, there exists no generally accepted definition of the rule of law functioning within the context of international organisations. Neither specialised, nor regional organisations have created a definition which would be widely accepted, nor did the UN diffuse a particular understanding of the concept influential enough to gain the wide recognition. The UN has been emphasising in the period before underlining its role in the promotion of the rule of law, that it was unable to create culturally generally applicable conception of the rule of law, as this would amount to 'legal imperialism'.²³³

Despite the above, when addressing the post-conflict situations (in 2004, in the context of East Timor and Kosovo) Secretary General of the UN, Kofi Annan thus referred to the rule of law:

'[The rule of law is] a concept at the very heart of the Organisation's mission. It refers to the principle of governance to which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.'²³⁴

The UN thus referred to the rule of law in the domestic context, as well as that of international one. The area of UN rule of law endeavours has been subsequently substantially developed after the 2005 World Summit.²³⁵ The outcome document though, noting the UN commitment to the value of the rule of law, was rather superficial on the actual meaning of the concept in the international plane relying heavily on the intuitive understanding thereof by the members of the UN.²³⁶ The states are thus reminded of their

²³² Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' at 21-22.

²³³ See: Wennerström, at 23-28.

²³⁴ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616.

²³⁵ For more details see the website United Nations Rule of Law: <http://www.unrol.org/>.

²³⁶ See: UN, 2005 World Summit Outcome, A/RES/60/1, para. 134:

'Recognizing the need for universal adherence to and implementation of the rule of law at both the national and international levels, we:

existing and potential international obligations (which pertains to the principle of clarity, prospectivity and transparency of norms), principle of equality (thus combating discrimination), judicial review (and therefore reference is made to the role of the ICJ), the position of the UN with reference to the rule of law (thus strengthening its external competence with relation to the concept). Subsequent report whilst determining the methodology to be adopted by the UN²³⁷ explained which are the three 'baskets' of rule of law activity. The first of the baskets focuses on the rule of law on international level; second on the rule of law in conflict and post-conflict situations; the third one on the rule of law in the context of long term development.²³⁸ The two later ones concentrate on influence on domestic activity of the states and are of lesser importance for this analysis (even though they are very important from policy-making point of view). The first one, instead, tells us a lot about the UN understanding of the rule of law in the international law context, thus the context of external policy of its member states. To a certain extent this 'basket' contains a collected wisdom from all three.

The subsequent reports state clearly which are the engagement terms of the UN with reference to the international rule of law with the due regard given to the UN own capacity of ensuring it on international stage. It is emphasised thus that the UN possesses judicial

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- (a) Reaffirm our commitment to the purposes and principles of the Charter and international law and to an international order based on the rule of law and international law, which is essential for peaceful coexistence and cooperation among States;
 - (b) Support the annual treaty event;
 - (c) Encourage States that have not yet done so to consider becoming parties to all treaties that relate to the protection of civilians;
 - (d) Call upon States to continue their efforts to eradicate policies and practices that discriminate against women and to adopt laws and promote practices that protect the rights of women and promote gender equality;
 - (e) Support the idea of establishing a rule of law assistance unit within the Secretariat, in accordance with existing relevant procedures, subject to a report by the Secretary-General to the General Assembly, so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building;
 - (f) Recognize the important role of the International Court of Justice, the principal judicial organ of the United Nations, in adjudicating disputes among States and the value of its work, call upon States that have not yet done so to consider accepting the jurisdiction of the Court in accordance with its Statute and consider means of strengthening the Court's work, including by supporting the Secretary General's Trust Fund to Assist States in the Settlement of Disputes through the International Court of Justice on a voluntary basis.'

²³⁷ The UN is to act with the help of the so-called 'lead entities' who are to standard set and diffuse in collaboration with member states both on global and country level. See: Report of the Secretary-General: Uniting our strengths: Enhancing United Nations support for the rule of law, UN Doc A/61/636-S/2006/980 at paras 43-50.

²³⁸ Ibid, at paras 39 -41.

mechanisms comprised of not only the ICJ, but also ad hoc and hybrid tribunals, monitors human rights obligations and advises on rule of law related issues in mediations, whilst in extreme cases provides direct protection.²³⁹ Effectively, the report emphasises the enforcement capacity inherent of the UN as international organisation pertaining to the title of rule of law guardian and promoter. As to the actual meaning of the rule of law in the international context, the UN Charter is reminded and the obligation imposed on the United Nations Organisation is to 'establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained'²⁴⁰. Nevertheless, the report shies away from determining the specific areas at stake – it invites the member states to the discussion and reiterates the UN obligation to assist them in meeting their international obligations and observing international standards (of human rights), and strengthening internal institutions entrusted with rule of law tasks. Only in the two last reports on strengthening and coordinating UN rule of law activities²⁴¹ the content of the conception of the international rule of law adopted by the UN is given substance. The focus is placed on (A) Codification, development, promotion and implementation of an international framework of norms and standards; (B) International and hybrid courts and tribunals and non-judicial dispute resolution mechanisms; and (C) Non-judicial accountability mechanisms (monitoring, fact-finding commission etc). All in all, the UN picture gives us also the concrete understanding of the rule of law, which departs from the clean 'thin' conceptions as quoted above. In fact, the reading of the UN documents concerning the rule of law leaves the impression of the UN not being capable of separating the rule of law objectives from other values that fall under its competence. International framework of norms and standards is to be developed by the organisation – it is not only about ensuring clear-cut conditions for their implementation. Furthermore, the UN is still not ready to sufficiently scrutinise itself from the perspective of the rule of law – none of the documents refers to the position of the UN Security Council legal acts and their enforceability.

²³⁹ Report of the Secretary-General on the Strengthening and coordinating United Nations rule of law activities, UN Doc A/63/226at paras 6, at 27-28.

²⁴⁰ Charter of the United Nations, Preamble.

²⁴¹ Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/64/298 at paras 9-36; Secretary General of the United Nations, 'Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/65/318'.

Nevertheless, the UN work on human rights thrives – in 2011 the indicators for human rights²⁴² were published and since 2007 the Rule of Law Coordination and Resource Group has been overlooking the coherence of the rule of law approach across the UN agencies. It is also the source of guidance notes of the Secretary General on addressing the issues concerning rule of law in the variety of UN activity contexts. In 2011 the Guidance Note²⁴³ concerning the strengthening the rule of law on international level. Here the determination of activities is sourced in the principles common for the members of the UN. These are:

- a) 'The principle that States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations;
- b) The principle that States shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered;
- c) The duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter;
- d) The duty of States to co-operate with one another in accordance with the Charter;
- e) The principle of equal rights and self-determination of peoples;
- f) The principle of sovereign equality of States; and
- g) The principle that States shall fulfil in good faith the obligations assumed by them in accordance with the Charter.²⁴⁴

On the basis of the above principles the framework for action was defined. The UN activities concerning the rule of law on the international level should encompass:

- 1. 'Promotion of the uniform and consistent application of international law;
- 2. Promotion and awareness-raising of treaties;
- 3. Assistance in the progressive development of international law and its codification;
- 4. Teaching and dissemination of international law;
- 5. Technical assistance on international law matters;
- 6. Coordination and cooperation with other organizations active in international law matters;
- 7. Support to international dispute settlement mechanisms;
- 8. Establishment and assistance to the international and hybrid accountability and justice mechanisms and their successor residual mechanisms;

²⁴² United Nations, *The United Nations Rule of Law Indicators - Implementation Guide and Project Tools* (United Nations 2011).

²⁴³ The Secretary-General of the United Nations, 'Guidance Note of the Secretary-General: UN Approach to Assistance for Strengthening the Rule of Law at the International Level' (*United Nations*, 2011) <<http://www.unrol.org/doc.aspx?d=3063>>

²⁴⁴ *Ibid*, at 4-5.

9. Exercise of rights and obligations resulting from the international juridical personality of the Organization (privileges and immunities).²⁴⁵

The United Nations work in the area of the rule of law is surely becoming more intense. There is a lot of effort to determine the organisation's approach to the concept. The thus developed conception is clearly operational and intertwined with other policy fields lying at the core of the UN action. Judging on the basis of the current situation we can see that the rule of law for the UN has two benchmarks: compliance with international obligations, and accountability mechanisms (judicial review and dispute settlement). The generality of the two areas provide direction to the study, yet on their own they are not sufficient as the conceptual base for the broad analytical framework.

Probably the other attempt at benchmarking international rule of law that is worth the mention is the one undertaken by the World Justice Project. The idea that underlies this effort amounts to a normative statement that every nation has its strengths, weaknesses and areas for improvement that should be tracked down. The Project defines the rule of law as a system based on four principles:

- 'The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property.
- The process by which the laws are enacted, administered and enforced is accessible, fair and efficient.
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.²⁴⁶

The project measures data on the basis of nine indicators corresponding to various dimensions of the rule of law.

1. Limited government powers.
2. Absence of Corruption.
3. Order and Security.
4. Fundamental Rights.
5. Open government.
6. Effective regulatory enforcement.

²⁴⁵ Ibid, at 5-9.

²⁴⁶ Mark David; Agrast, Juan Carlos; Botero and Alejandro Ponce, *The WJO Rule of Law Index* (The World Justice Project 2011), at 1-2.

7. Access to civil justice.
8. Effective Criminal Justice.
9. Informal Justice.²⁴⁷

The composition of each of the measured indicators is further broken down into a number of areas.²⁴⁸ Interestingly enough, the Index does not consider the European Union as the target of its measurement²⁴⁹ – clearly the index is about states and nations ruled by particular governments in a comprehensive manner. Whilst the methodology behind indicators are beyond the scope of this study, it is important to note, the use the World Justice Project uses its indicators. As it seems the rule of law, as measured for the purposes of evaluation and understanding the long term change within specific states, can be only taken into consideration provided that the image is comprehensive – it takes into consideration all the dimensions where the authority is exercised. The EU is, from this point of view, a very difficult case study, since many of its functions are delegated to the Member States as the result of the principle of subsidiarity, whilst in the area of external relations, many of the outlined dimensions find no application. From this perspective, the comprehensive and concrete attempts to define and benchmark rule of law are of no great use from the perspective of tracing the legal criteria for policy evaluation.

²⁴⁷ Ibid, at 1.

²⁴⁸ Ibid, at 11- 20.

²⁴⁹ Ibid, at 23 – 36.

IV. The EU and the Rule of Law

In the search for a benchmark for the evaluation of the EU external human rights policy we scrutinised solutions offered for the domestic and international legal contexts. The analysis of the rule of law conceptions has been given shape from the outset by the widely spread and developed critiques of the external human rights policy of the European Union. It needs to be underlined that the criticism is directed at the European Union given that it is the main architect and the builder of the policy. In other words, the focus in this context is placed on the Union in the process of policy and rule making, and the Union in the process of rule application. In the external context we are dealing with two different environments. The internal one, governed by the quasi-classic internal rule of law conception and the external one governed by the rules and principles of international law. Whilst the lens of analysis in the former case is not problematic, the one in external sphere is a harder nut to crack. From the perspective of international law, we could be looking at the limited application of the rule of law *in abstracto*. However, in the light of the findings of the first Chapter, it is clear that the Union is expected and urged to go beyond the basic standard; to 'externalise' the concept that, presumably, guides it in the internal sphere. Let us see, therefore, what kind of approach the Union itself has developed to face the challenge of rule of law framework in its policies.

The European Union has not made an effort to consistently use the rule of law, neither did it reflect in a focused manner on its potential meaning. Instead, the ideal has been treated somewhat instrumentally by the EU institutions in various policy contexts serving different purposes. Indeed, we do not even know what was the conception that the EU started from.²⁵⁰ Nevertheless, the conceptions of the rule of law functioning in the realm of the European Union policies and within its system of law originate from, though are not in any form exclusively ascribed to, the earlier mentioned conceptions of the common law *rule of law*; and continental *Rechtsstaat* and *l'état de droit*. As Wennerström observes, these roots are the part of the *habitat* of the EU legal system; they determine the *Vorverständnis* of the institutions functioning within and the rules that govern them.²⁵¹ In Bordieu's sociological understanding they would form the legal *habitus* in which the European decision makers

²⁵⁰ Wennerström, at 53-60.

²⁵¹ *Ibid*, at 48-49.

developed the European structures. Wennerström further points that the influence of those national conceptions, according to him, is visible in the legal institutions developed within the system of law of the European Union. He concludes with reference to the constitutional conceptions:

'If the strength of the constitutional system and the dominant position of the constitutional court are the main German contributions to the perceptions of the rule of law in the EU, the French contributions are both indirect, in having contributed to the German model and its emulation into the EC system, and direct, adding to the doctrine of *principes généraux* to the law developed by the European Court of Justice which (...) is one of the most important conduits for fundamental rights and the rule of law into EC law. In addition to this the principles of *negative* and *positive Bindung* (in spite of the German term used here) are perhaps even more a French contribution to the EC constitutional law and the administrative culture of the EC and the EU.'²⁵²

The nationally based conceptions of rule of law thus serve as the map of migrating ideas rather than the conscious choice on the part of the Union of the particular road to take when adopting one uniform idea of rule of law. In fact, various language versions of the TEU treat the three national based original concepts as equivalents – leaving space both for interpretation as well as for the functional evolution of the EU conception.²⁵³ We should, therefore, perceive the development and the 'pick-and choose' approach visible in the development of the conception(s) on the European ground as an attempt to unify the *habitats* of the Member States' legal systems (general principles of the EU law) aspiring to the creation of the EU unique system of law.²⁵⁴

²⁵² Ibid, at 76.

²⁵³ Curiously, at the national level all three of the conceptions have acquired lives of their own and continue to develop in manners particular for each of them. For example the German *Rechtsstaat* has been undergoing constant evolution since the Second World War with the growing emphasis placed on the substantial elements added to what could be perceived as legality principle. The Bundesverfassungsgericht in its judgements, starting off with the *Maastricht Judgement* (op. cit.), through *Solange I* (op. cit.), *Solange II*, (op. cit.) and arriving at the *Lisbon Decision* (op. cit.) has consciously marked that feature of German legal system that attributes rule of law value to fundamental rights. This is the element of German constitutional identity distinct (at least in this point in time) from that of the European Union.

²⁵⁴ This can be observed with relation to discussions of various features of rule of law in internal perspective of the EU. See for instance the collection: Leonard F. M. Besselink, F. Pennings and Sacha Prechal, *The eclipse of the legality principle in the European Union* (Kluwer Law International BV 2011). There the authors make constant reference to the difference in the understanding of the principle of legality – one of the three pillars of the rule of law as identified by Dicey; the difference which is particularly visible between the continental and common law systems. See: Gerdy Jurgens, Maartje Verhoeven and Paulien Willemsen, 'Administrative Powers in German and in English Law' in Leonard F. M. Besselink, F. Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International BV; 2011), at 37-53. In both of the legal systems the executive acts need to have their source in the statutory foundations; in English system this takes on different facets depending on whether we are speaking of the government or other executive bodies. In the

Various accounts point to different uses of the rule of law, yet they agree that there exist at least two conceptions of rule of law developed by the European Union – that for internal purposes and that for external dealings. Wennerström, for instance, distinguished between the concept of the rule of law developed for the internal use by the Court of Justice in the light of the Treaty provisions, that prevalent in the enlargement context, and finally that of the external policy.²⁵⁵ On the other note, Jacobs pointed to the correlation between the values associated with the rule of law and the idea of functioning of the market economy.²⁵⁶ He searched for the principles of the rule of law in the jurisprudence of the Court, pointing to the concepts developed with time and amounting to the general principles of the Union law and values underlying the Union legal system.²⁵⁷ Thus the Court has developed the notion of the Community legal order which was to safeguard the proper functioning of the internal market and to guarantee adequate protection for the fundamental freedoms. The new legal order, to fulfil its function, was equipped with tools that are generic for national legal systems, though highly unusual for the system of international law (such as that of the European Communities at the beginning of their existence): direct effect²⁵⁸, primacy of the EU law²⁵⁹, the characteristic 'floating' self-determined jurisdiction of the Court of Justice²⁶⁰, and fundamental principles of law common to all the European systems.²⁶¹ This has lead

EU context usually the more straightforward continental approach to the legality principle is taken, yet things change when we speak of the EU sourced law applied in a legal context. There the legality composite of the national and EU one come into place, that being visible especially whenever direct effect of EU sources of law kicks in. Comp.: Maartje Verhoeven and Rob Widdershoven, 'National Legality and European Obligations' in Leonard F. M. Besselink, F. Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle of the European Union* (Kluwer Law International BV 2011), at 55-72.

The unifying element in approach represented by them lies in the functions the concept of legality assume with relation to the policies of the EU:

- '-the democratic function of *legitimizing* the existence of public authorities, their powers and the exercise thereof within the limits of the set legal rules;
- the instrumental function of *attributing* public authorities with powers and responsibilities in line with preferences and the local situation, and in accordance with a prevalent distribution of powers;
- the normative function of *regulating* the use public authorities can make of such powers.'

Leonard F. M. Besselink, F. Pennings and Sacha Prechal, 'Introduction: Legality in Multiple Legal Orders' in Leonard F. M. Besselink, F. Pennings and Sacha Prechal (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International BV 2011), at: 6-7.

²⁵⁵ See for instance: Id.

²⁵⁶ Jacobs, at 127.

²⁵⁷ Ibid, at 35 ff.

²⁵⁸ *CJEU, Case 26/62 Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v. Nederlandse Belastingadministratie* [1963] ECR 1.

²⁵⁹ *CJEU, Case 6/64 Costa v ENEL* [1964] ECR 585.

²⁶⁰ *CJEU, Case 22/70 EC Commission v EC Council (ERTA)* 1971] ECR 263; *CJEU, Case C-294/83 Partie Ecologiste Les Verts v European Parliament* [1986] ECR 1339.

²⁶¹ For wider discussion of the rule of law elements of the European legal systems – see: Jacobs, at 38 – 66.

some commentators to believe that the European Union conception of the rule of law goes beyond the formalistic 'rule by law', or in Jacobs's terms:

'(...) the rule of law should be understood today as embodying the supremacy of the law, to ensure that the public authorities, including the former 'sovereign', are, where appropriate, themselves, subject to law. This will imply extensive judicial review including limited review of parliamentary legislation, based on a constitutional or quasi-constitutional texts; but also based on certain fundamental values especially fundamental rights.'²⁶²

The conclusive remarks made by Jacobs correspond to the legal development of the European Union (and earlier the European Community). We see the rule of law, as it has been mentioned before, appeared literally in the Treaty of Rome, where it was used as the criterion for the evaluation of the legality of European Community acts by the Court of Justice.²⁶³ It's elements have been developed by the court and consisted in supremacy of law (including principles of legal certainty, principle of correct legal basis, and obligation to legally motivate legislative acts), principle of separation of powers, and judicial review. The Court has also developed substantive components of rule of law. These were fundamental rights, inasmuch they concerned legal protection, fair application of law (including the principles of equality and principles of proportionality) and the principle of effective enjoyment of Community rights.²⁶⁴

Surprisingly, however, the Court never referred to these principles as the ones constituting the EU understanding of the rule of law. Literally for the first time, it referred to the concept as late as in 1986 in the *Les Verts* case²⁶⁵ where the European Parliament was included in the group of institutions whose acts underlie legality review against the standard of the rule of law. The principle according to which all legal acts underlie the legality review – even those not formally included in the group enumerated in the Treaty, constitutes one of the indispensable elements of the rule of law definition – that of the equality as a principle of general application. As such this principle was developed separately by the Court as one of

²⁶² Ibid, at 49.

²⁶³ The presence of the concept amongst the criteria of legality review points to the awareness that the mere establishment of the review constitutes the rule of law within the European Union; the review which in case of the European experiment was very wide allowing the Court to broaden the constituents of the European rule of law. See: *ibid* at 42-50.

²⁶⁴ Wennerström, at 117 – 135.

²⁶⁵ *CJEU, Case C-294/83 Partie Ecologiste Les Verts v European Parliament*. Notably, the reference to the rule of law and the constitutional charter of the Communities was made at the eve of the adoption of the Single European Act, thus marking the transition to the higher level of political supra-nationalism.

the general principles of law embodying shared values common for all of the Member States. Apart from the principle of equality, the commentators enlist: the principle of legal certainty, the protection of fundamental rights, the principle of proportionality – thus indirectly implying the thick conception of the rule of law. Such approach to the rule of law reflects the awareness on the part of the Court that in the European architecture the 'notion of the rule of law also conveys the idea that the ultimate source of authority is no longer the sovereign in the shape of a monarch, or even in the shape of a Parliament; but rather certain values, or certain fundamental principles, which form an inherent part of a well-functioning of the system.'²⁶⁶ It also mirrors the belief in the fact that all manifestations of exercise of power are subject to judicial review. For this purpose the following need to be ensured: access to courts, fair trial and effective remedies.

In sum, the Court has based its judgement on the domestic, loaded with meaning concept of the rule of law but translated it instrumentally²⁶⁷ into the legal system of the Union. It did not give the substantive depth to the concept, evoking instead the familiar notion of constitutionalism and, therefore, relating its activities to the *habitat* of the EU legal system.²⁶⁸

Subsequently, as the evolution of the EU and its legal system progressed, the ideal of rule of law was evoked in the Maastricht Treaty preamble²⁶⁹ and recognised as the objective of the common foreign and security policy²⁷⁰. As it seems, from the beginning the rift between the internal and external use of the concept has been established. The difference was named later on by the 1997 Treaty of Amsterdam where the rule of law was included in the

²⁶⁶ Jacobs, at 62.

²⁶⁷ The 'integration by law' – the idea that the law is a predominant tool for the supranational project of the European Union was the approach promoted in the framework of pro-European thinking. See: Mauro Cappelletti and others, *Methods, tools and institutions. Book 2. Political, legal and economic overview* (Walter de Gruyter 1986) See also Joseph Weiler's explanation why the Court of Justice in the early 1960s case law developed the doctrines of direct effect and primacy in such radical manner: Joseph Weiler, 'The Community System: the Dual Character of Supranationalism' 1 *Yearbook of European Law* 267-267. Weiler claimed that this could have not been possible had the political supranationalism had been developed in such a degree as it was at the time of the 1987 Single European Act. For the critique of the instrumental use of law see: Brian Z. Tamanaha, *Law as a Means to an End Threat to the Rule of Law* (Cambridge University Press 2006).

²⁶⁸ As it was the case also in the more recent *Kadi* judgment. See: CJEU, *Joined cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakat International Foundation v Council and Commission*.

²⁶⁹ 'CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law(...)'.
²⁷⁰ Article j.1: 'The objectives of the common and security policy shall be: (...)to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.'

provision amongst the founding principles of the EU, maintained as the general clause criterion for the legality review²⁷¹. At the same time, in the external realm, the rule of law became the explicit objective of not only the CFSP (article 11 TEU), but also of the development cooperation (Article 177 TEC). The Treaty of Nice retained the 'founding principles' and the legality review criterion of the rule of law which as observed by Wennerström had the same content in internal context as under the Treaty of Rome regime²⁷², whilst enhancing the use of the concept in the external realm – according to Article 181a, it was to be an objective of economic, financial and technical cooperation with third countries. This provision was certainly added as the result of the advancement of the enlargement process and the assistance to the candidate states.

The Constitutional Treaty and the Treaty of Lisbon have maintained this architecture, emphasising the underlying value character of the EU rule of law in internal dealings and with reference to the institutions. Also in external sphere the rule of law was upheld, yet again without the development of the meaning. This phenomenon found its reflection in the European Commission to place a sort of procedural boundaries as to how the rule of law is supposed to be enforced in the internal context, on the basis of Article 7 TEU.

This lack of reflection on the exact meaning of the EU rule of law conception on the part of the executive branch of the institutions in the internal affairs of the European Union was, to a certain extent, short lived. Having declared the commitment to the rule of law as the founding value common for the Member States, the Union, once opening the enlargement process, needed to substantially determine what is the meaning of the value it claimed to be based on. The general statements preceded yet again the substantial reflection. Firstly, the 1993 Copenhagen criteria²⁷³ have stipulated that the potential Member States are to respect rule of law determining thus the basis for their legal and political systems. These is the actual beginning of the practice of conditionality – the instrument which became the trademark of the EU enlargement. It is important to note that the rule of law conditionality has not been invented by the European Union. It had been in place before in Europe developed by the Council of Europe.²⁷⁴ Arguably, however, the EU conditionality was different inasmuch as it

²⁷¹ See: Articles 35 TEU and 230 TEC in the Amsterdam Treaty wording.

²⁷² Wennerström at 155.

²⁷³ European Council, *Conclusions of the European Council* (Copenhagen 21 - 22 June 1993).

²⁷⁴ Wennerström at 28-31.

was based on the actual, verifiable implementation rather than on political declarations.²⁷⁵ The formal requirement was included later in the Treaty of Amsterdam (Article 49 TEU). Similar approach has been adopted in the European Neighbourhood Policy Processes. The self-identification with the value and external self-presentation needed to be translated in the specific requirements as to the internal legal structure of the state which was to become one of the European Union. Thus, the Union's substantial perspective on the rule of law is encoded in the enlargement process and documents.

Interestingly, whilst the internal meaning of the conception of the rule of law has been to a large extent developed by the European Court of Justice, in the context of external policy, the Court refrained from adjudication on the matter. In 1978 case *Mattheus v Doego*²⁷⁶ the Court declared itself incompetent to adjudicate on matters of enlargement. It was thus up to the Commission (which in this particular case requested clarification of Article 237(1) TEC – current Article 49 TEU) to clarify the concept that re-appeared in political Copenhagen criteria 15 years later. Responsible for accession negotiations and in charge of financial instruments, the Commission defined 'state governed by the rule of law' on the occasion of using those instruments. Wennerström in his extremely detailed account on elaboration of the conception of the rule of law by the European Commission quotes after the 'PHARE Programme for the implementation of the rule of law 1999-2001' that such state has 'a constitutional system whereby the different organs of the state are aligned and limited in such a way that the state cannot legally infringe on citizens' rights', and the main components of the system were to be: (a) the principle that all acts by public authorities are founded in and subject to the law (the supremacy of law); (b) a system of separation of powers; (c) respect for fundamental rights and freedoms; (d) independence of the judiciary.²⁷⁷ The enlargement process proceeded with the initial use of opinions (1997) prepared by the Commission at the request of the Council, and subsequently reports prepared according to uniform methodology. This uniform methodology applied in these instruments, in the absence of the definition of rule of law used by the European institutions

²⁷⁵ This is also the difference frequently emphasised when the two types of conditionality are evaluated – the enlargement conditionality and the general external policy one. The former one was actually verified through the set of benchmarks, studies and reports; the later one boils down to the set of the political criteria subject solely to political declaration.

²⁷⁶ *CJEU, Case 93/75 Mattheus v Doego* ([1978] ECR 2203 ed).

²⁷⁷ See: Commission Services document of 18 December 1998, quoted after Wennerström at 170-171.

points to the most important elements of the conception from the European Commission point of view. Thus, the areas falling under the scrutiny were those which belong to the group of political criteria (as defined by the Copenhagen conclusions) and focus on the structure and functioning of three branches of government. Especially the post-1997 reports reveal more about actual focus in the rule of law practice of candidate states. Wennerström identified the following areas which were of interest to the European Commission: (a) supremacy of law; (b) separation of powers; (c) respect for fundamental rights; (d) independence of the judiciary; (e) measures against corruption.²⁷⁸ The resulting conception roughly corresponds to the internal one developed by the Court of Justice enriched by measures combating corruption (and therefore the foundations of the remaining four components of the rule of law) and has been re-applied in the context of the European Neighbourhood Policy.

In a confusing manner, the supposedly most developed conception of the rule of law in the EU practice, created for the use of enlargement policy is not the only one functioning in the external realm. Wennerström distinguished also rule of law conception applicable in the broadly understood external policy field. Similarly to the rule of law of enlargement conditionality, the rule of law in external context appears in majority of instruments (accompanied usually by principle of observance of human rights) in the conditionality context. Obviously, the concept is in no way defined; it is treated as the statement of values on both sides and amounts to political declaration as it is demonstrated by the practice. Wennerström analysis of various policy fields – co-operation, development and the ESDP rule of law – identifies the major differences between them and the diminishing 'strength' of the conception which in the ESDP context consists of fragmented components of the EU internal rule of law conception (independence of judiciary, some fundamental rights to be guaranteed, anti-corruption).²⁷⁹ The manifestation of the searched rule of law ideal in this context does not provide us with any guidance for the purposes of the substantial analysis as the rule of law in these contexts shares the same characteristics as human rights in external policy of the European Union.

²⁷⁸ Ibid, at 175-223.

²⁷⁹ Ibid, at 302.

The inconsistency in the conceiving and application of the rule of law conception in different policy fields does not seem coincidental. Its 'pick-and-choose' approach in the external context can be criticised. It needs to be noted that this is no novel attitude – particular foreign policy fields which need reference to rule of law (such as development) work on the basis of the inequality of partners. In such contexts the EU rule of law functions as the lighthouse for the partner state rather than enforceable obligation. Wennerström concluding his extensive study of the use of concept of rule of law emphasised the lack of clarity and legal certainty resulting from such diversified use of the concept. I would not go so far in the evaluation. The well defined rule of law is to be present in the internal dealings of the European Union – it is a matter of its internal legitimacy and transparency. It seems that the EU could have not defined what could be meant by rule of law there as the internal legal system, safe for its underlying founding concept has been in the process of making. Yet, in external realm, the rule of law is as fluid as the general one in international context. It is, similarly, work in progress, thus insecurity of its meaning within different policy realms is something to be expected. Maybe as the external legal system of the EU policies matures, it will gain more and more solid characteristics.²⁸⁰

V. Rule of Law Common Core – Benchmarks for Policy Evaluation

The quest for identification of components of the rule of law is in fact the search of the understanding of what makes any EU policy legitimate inasmuch the underlying values are concerned, their transposition into policy instruments, and, finally, their enforcement. This is true not only for Petersmann and de Búrca's notion of common values lying at the base of international constitutionalism.

The area of human rights policy is bound to be difficult in this respect as requires that both values and objectives to be attained. As such, it has two dimensions: that of affirmation of a value and thus the quasi-absolute compliance with its content - and that of what goes beyond – its outer manifestation and promotion. Whilst internal human rights policy of the Union, as it stands under the current Treaty framework, may be regarded as 'on its way' to

²⁸⁰ Although, some commentators emphasize the post-colonial air attributed to rule of law and the manner in it is conceived as 'a good thing' and, therefore, an excuse for all sorts of atrocities committed by the 'civilized' Western world. For a general account representative of the group of scholars associated with social constitutionalism, see: Mattei and Nader In particular, for the general overview of the argument, see: Introduction; pp 13 and the following.

fulfilling characteristics of those dimensions, the external one, is far from there, though the equipage of the policy itself is impressive. When we leave the safe and closely defined area of the EU independent and self-contained legal order, it becomes very difficult to evaluate the EU actions. It is somewhat natural to expect the EU to 'externalise' its internal policies according to its founding rules such as that of the rule of law, especially if we are speaking of something as universal as human rights. This is exactly what is epitomised in the criticisms of the EU external human rights policy presented in Chapter 1.

In essence, because of the importance of both values (rule of law and human rights), the rule of law principles applicable in the internal context need to be 'externalised' for the purpose of delivering human rights related objectives. 'Externalisation' in this context, however, is not a straight forward process. There are two problems which are pertinent to determining the mode of externalisation, and thus, the rules underlying the process. First one relates to the double nature of the human rights within the EU legal order – human rights being both the value with which the EU is identified and the policy objective. This puts the European Union already in internal sphere as the violator and the active norm enforcer. What happens when we start evaluating the internal EU policies, is that the two positions overlap – it is therefore very difficult to evaluate the EU and the policy itself. Secondly, when we enter external policy realm, the legal setting changes substantially and similarly transforms the rule of law concept that is applied. This change, however, with reference to the EU does not seem to be so drastic as in case of the general international legal setting analysis. There must be something that makes the EU different from other international actors. The mode of the EU foreign policy appears to differ substantially from that of the traditional one of states (foreign policy mode). De Búrca, in fact, whilst proposing an alternative one – governance mode of the EU external policy – pointed to the constitutive nature of presence of milieu goals as objectives.²⁸¹ If that is the case, 'externalisation' of the EU internal rule of law might be of useful analytical value, explaining at the same time the existence of double standards of evaluation – those towards the EU and those towards other international actors.

From the rule of law perspective, we are speaking here again of two capacities of the EU. The first one is that of a norm creator (legislator) – the EU as the fluid constitutional construct, work in progress thus in need of new conceptions and modes of activity, so that,

²⁸¹ G. De Búrca, *EU International Relations: The Governance Mode of Foreign Policy* (NYU Law School 2010).

with time, the particular type – the EU type – of the conception is brought together. In the external context, especially in bilateral EU – third country relations, the EU continues to perform as a legislator due to the pure objective reasons – it is simply more powerful. This is true for co-operation, development, neighbourhood, and enlargement policies. In few instances would the EU face an entity equally powerful. Here, as it seems, the standard of evaluation would be higher given the inequality of actors involved. It is, therefore, up to the EU legal order to ensure that the rule of law principles are ensured. On the other hand, the EU is subject to the rules which, once created, need to be enforced in an equal, and predictable manner. And should there be problems with such enforcement, adequate mechanisms should be ensured at the stage of rule creation, to resolve conflicts. The rule of law standard to be applied in the external sphere against the policy of the EU should address both sets of problems.

Let us remind the criticisms in order to be able to relate them to the rule of law components identified in previous sections of this chapter, bearing in mind the above problematic issues. The call for legitimacy of the European Union external human rights policy is the call addressed to the EU – the legislator. It corresponds to the Court of Justice devising principles of the EU legal system. In EU terms, we are speaking here of the supremacy of the EU law, principle of separation of powers. This is also the underlying claim of the first dimension of the non-coherence scolding the unbalance between the internal and external policy fields. The other two dimensions of incoherence refer to the application and enforcement of the EU external human rights policy – it needs to be applied in an equal manner to all the countries, and it should fit into the hierarchy of policy objectives rather than conflict with them. Application and enforcement correspond to judicial review envisaged by the Union itself for its own standard of the rule of law, yet it goes beyond. The final element put forward by the EU is the observance of fundamental rights which given that we are speaking of human rights policy, is assumed.

The internal conception of the rule of law as conceived by the EU does not give us sufficient guidance in terms of determining the benchmarks for further policy evaluation, yet it gives us the idea as to what the EU perceives as important for its internal dealings. From this point of view one could analyse the internal aspect of creation of the external human rights policy of the European Union.

Let us see how the identified criticisms fit the thin theories of rule of law. They commonly require non-arbitrariness, transparency, clarity, prospectivity, and generality. These are all conditions that refer to the process of norms creation – the EU as a legislator conceiving its policy in a legitimate manner guided by the principles of the EU law, and devising them in general manner thus applicable to both internal and external areas. The mechanism of judicial review should be ensured in case the legislator trespasses on norm creation principles.

Subsequently, the principles are to be applied in equal manner to actors concerned – and according to assumed hierarchy of values that are equally in all circumstances. Thus the principle of equality governs the application of principles devised by the Union. Judicial review should apply if equality is not preserved.

Finally, should there be the a misunderstanding concerning the application of norms, the mechanism should be made available allowing for conflict resolution.

Such approach to rule of law components guides us in order to determine the benchmarks for further analysis. Hence, if we are to use the rule of law lens in order to analyse the EU external human rights policy tools, these are the categories ordering such analysis:

Rule of law principles concerning policy/instruments/norms creation;

- Non-arbitrariness, generality, prospectivity
- Transparency
- Clarity
- Judicial Review

Rule of law principles concerning application of the created norms;

- Equality
- Transparency
- Judicial Review

Rule of law principles concerning conflict resolution

- Accessibility
- Enforceability of decisions

Neil Walker in his account of social significance of the rule of law refers to both the benefits the rule of law might bring if applied in the European Union context as well as the negative consequences if misapplied.

'For a still emerging polity such as the EU, the relationship with the rule of law is more fluid and more dynamic. Put starkly, the untapped potential for the rule of law to make a positive

difference – and not just for the absence to make a negative difference – is greater in the case of the EU than that of most other contemporary polities and, in particular, most states.²⁸²

It is obvious, therefore, that the above developed categorization of rule of law components extracted from the overview of rule of law approaches is not a final one. Yet, it provides critiques with clear criteria for evaluation of the policy. This, in a long run, may prove more useful in various policy areas. For the purposes of this study, the categorisation will be used as a tool to understand which concrete features of the external human rights policy are desirable, which are unattainable in the external policy context, and which, in practice, have developed in the forms not known in the constitutional structures defined by rule of law principles.

²⁸² Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', at 119.

Chapter 3 – Identifying the Issue at Stake: Introducing the Toolbox of EU External Human Rights Policy

DRAWING INSPIRATION

*from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law.*²⁸³

I. Introducing the Subject of the Analysis

So far, we have analysed the underlying paradigm through which the EU external human rights policy is viewed and extracted the concrete legal demands that can be addressed at the policy at the stage of its creation, application and overview as performed by the courts. It is time now, to focus on **what** it is exactly that is to be analysed in the space of the Part II of this study. We are interested here in legal instruments which are consistently employed by the EU for the purposes of its external human rights policy. The introduction to those instruments must be preceded by establishment of the context within which the EU external human rights policy functions.

This context will subsequently be analysed in detail from the perspective of the identified rule of law benchmarks. The focus here is on tightly defined margins where the EU can enter into international contractual obligations based on the competence ascribed to it. The choices of means to act are, on the other hand, made within legal system's boundaries, yet given the external outlook of the instruments, outside of the main frame where the existence and execution of competence is discussed. This might be perceived as the reverse to the situation discussed in the 1990s with reference to the gap between the Community and the CFSP pillars.²⁸⁴ Possibly the 'capability-expectations gap' has been filled, albeit not in a manner which was advocated.

Against this context, the brief presentation of the toolbox will ensue. It will be performed with the purpose of categorising the tools on the basis of two simple criteria: who are the legislators for such instruments and subsequently who are their addressees.

²⁸³ Preamble, Treaty on the European Union.

²⁸⁴ See for example: Hill R. Regelsberger and W. Wessels, 'The CFSP Institutions and Procedures: A Third Way for the Second Pillar' 1 European Foreign Affairs Review.

Thus made categorisation will form an introduction to Part II where benchmarks will be applied in a systematic manner to each of the toolbox's categories.

II. The Context – Constitutional Architecture of the Treaty of Lisbon

1. Principles and Objectives in External Human Rights Policy – what Function for Human Rights?

The objectives to be attained by the human rights policy of the European Union are the starting point of the analysis. Ultimately, they inform us about the framework of the policy and, therefore, what is the functional approach characterising the EU when pursuing its objectives in this field.

Even if an essential element of EU's identity and ethos²⁸⁵, the notion of human rights is not approached in a uniform manner. They function as values, principles, objectives both in internal and external setting.²⁸⁶ And depending on whether we are speaking of the substantive content of the policy or the manner in which it is enforced, human rights gain on various characteristics.

On the face of it, human rights are more of an organic baseline from which the Union is supposed to act – in fact the 'respect for human rights' is supposed to be a founding value of the EU, as pronounced by Articles 2 and 3 TEU, the principle which is to be respected and upheld according to Article 21 TEU (and 7 TFEU) and an area to which the EU is to contribute through its actions – thus, effectively, an objective. As Williams argues commenting on internal meaning of 'respect' we can only speculate as to what it can be:

'What then are the realistic implications of identifying "respect" as the operative institutional command? Does it imply a responsibility to act as a moral agent in relation to human rights, dictating an active or positive obligation? Or does the principle merely possess a passive or negative nature, one that forbids the EU institutions from violating human rights, but does not impose upon them a greater duty to promote and enforce human rights? The jurisprudence of the ECJ would seem to support a more restrictive interpretation. In *Opinion 2/94* on Accession by the EU to the ECHR the Court famously, if ambiguously noted that "[n]o Treaty provision confers on the EU institutions any general

²⁸⁵ For the discussion of the evolution of external policy and its importance for the EU's identity, see: Marise Cremona, 'External Relations and External Competence of the European Union: the Emergence of an Integrated Policy' in Paul Craig and Gráinne de Búrca (eds), *The evolution of EU Law* (Oxford University Press 2011), at 260-268.

²⁸⁶ For an extensive discussion of the confusion it gives rise to, see: Marise Cremona, 'Values in EU Foreign Policy' in Malcolm D. Evans and Panos Koutrakos (eds), *Beyond the established legal orders : policy interconnections between the EU and the rest of the world* (Hart 2011).

power to enact rules on human rights". At the same time it acknowledged the declaratory importance of respect for human rights in the EU, noted that "fundamental rights form an integral part of the general principles of law" and maintained that "respect for human rights is (...) a condition of the lawfulness of EU acts".

Beyond the ECJ, the development of a wide spectrum of fundamental rights texts, legislative rules, institutional practices, supported agencies, and applied resources testify to a broader and deeper conception of the commitment to "respect" than a purely negative connotation would allow. Perhaps here we find the basis for an ethical struggle, a central tension lying at the heart of human rights in the EU's institutional ethos.²⁸⁷

It seems that deriving operational command from the phrase 'respect for human rights' is an overstatement. Nevertheless, it illustrates well the lack of clarity as to what function human rights are to play in the policies of the European Union. We need to look further into the Treaty of Lisbon provisions in order to uncover at least partially what kind of meaning we should derive from human rights related policy goals.

As discussed already in Chapter 1, the Treaty has specified goals which in the light of Union's origins could be regarded as presenting hierarchy (Article 3(1) TEU). All three objectives – peace, the Union's values and the well-being of its peoples – are to be promoted, similarly as interests and values which are to be upheld in relations with the wider world (Article 3(5) TEU). The verb 'promote' confuses the picture. Does it mean that the EU is supposed to be merely an advocate for peace and values both internally and externally? The positive action included in this term seems to be very static – it is more of a situation in which the EU presents itself as the entity which has achieved the three objectives and thus is legitimised to urge other actors to follow suit. It seems as if the EU was to advertise the method of its integration, such as was facilitated with the use of the three elements enshrined in Article 3(1) TEU.

Only then Article 3(5) takes the human rights business further. It imposes a much harder obligation on the EU – it is supposed to take action to endorse, sustain, or even defend (these are some of many synonyms of the word 'uphold'²⁸⁸) the values and interests. In addition, it is to contribute to *inter alia* protection of human rights. The pairing up of values

²⁸⁷ Williams, *The ethos of Europe : values, law and justice in the EU*, at 114.

²⁸⁸ Interestingly other language versions narrow down the term giving to 'promotes and upholds' stronger or weaker meanings. For instance the Union in German: 'schützt und fördert' which means literally – protects (therefore acts in a decisive manner) and promotes; in French 'affirme et promeut' and in Italian 'afferma e promuove', in Portuguese: 'afirma e promove' – literally 'affirms and promotes' (thus, merely confirms the commitment), and in Polish: 'umacnia i propaguje' – literally 'strengthens and promotes'.

and interests is reminiscent of concerns present in any of the policy fields which have external implications (the only external policy exception that comes to mind is the development policy where it is believed that development and human rights policies are complementary if not conducive for one another). Security, migration, trade interests are to be subject of the "endorsing, sustaining or defending" alongside with values of the EU. The nexuses are searched for but usually the results are disappointing – human rights and other values of the EU usually need to give in when faced with more loaded in terms of economic, political, or military value interests. The exact function of human rights is, therefore, ambiguous. Frequently it is either determined elsewhere in the Treaty or is to be worked out in practice of the policy. Thus, the nexus between security and human rights is that of a traditional nature where human rights work as a conception limiting the power of an international entity – the European Union. Formally, however, there is no reference to human rights in particular provisions of the TEU concerning the Common Security and Defence Policy (Chapter 2 TEU), though the nexus is visible in provisions concerning the AFSJ and its external dimension where the objective of the policy area (predominantly security²⁸⁹) is to be pursued 'with respect for fundamental rights'. Furthermore, the nexus between migration (and thus a part of the AFSJ) and human rights is even of bigger importance as it reflects the abstract and concrete border creation – the development of the common identity of states belonging to the European Union and, therefore, the issues connected with belonging; inclusion and exclusion.²⁹⁰ Here, human rights help to define who is the 'other' and what kind of worldview this 'other' is to share if, he is to belong to the exclusive EU-lead club. Therefore, the proclamation of values constitutes the means of separation of 'us' from the rest of the world – in extreme case it could be taken to Schmittian idea of human rights determining who is Europe's friend or foe²⁹¹. The provisions on common commercial policy

²⁸⁹ See for instance the Conclusions of the study of securitisation of immigration policy where author concludes that in this policy field the EU is the Area of Security, Security and.. Security: Rens van Munster, *Securitisating immigration : the politics of risk in the EU* (Palgrave Macmillan 2009).

²⁹⁰ See contributions to the edited volume (especially Neil Walker's 'Denizenship and Deterritorialisation in the European Union' pp 261 – 274): Hans Lindahl, *A right to inclusion and exclusion? : normative fault lines of the EU's area of freedom, security and justice* (Hart Pub. 2009).

²⁹¹ As elaborated in: Carl Schmitt, *Der Nomos der Erde : im Völkerrecht des Jus Publicum Europaeum* (3. Aufl.[unveränd. Nachdr. d. 1950 erschienenen 1. Aufl.] edn, Duncker & Humblot 1988) Obviously, the friend-enemy dichotomy that has formed the basis of Schmitt's work since the 1920s (and in particular since the publication of the first edition of: Carl Schmitt, *Der Begriff des Politischen* (Duncker & Humblot 1979) and therefore also his writings that contributed to the formulation of national-socialist thought. It is important to emphasise, that Schmitt's relevance for this study is strictly connected with the extreme instrumentalism he

contain reference to the context of principles and objectives of the external EU's action (Article 207(1) TFEU), yet no specific stance is taken as to the position of human rights in the EU and world trade regime.²⁹² Similarly, the development cooperation is placed within the context of objectives and principles of the EU external action with a difference that given the mixed character of the competence in the area, the reference is made to the obligations made by the Member States under the auspices of the United Nations (see: Articles 208(1) and 208(2) TFEU respectively). What is interesting in those general formulations as to the role of human rights, is the presence of the 'context' of objectives and principles. Particular policy fields exist against this context, which is taken for granted. Yet neither promotion nor upholding are fully passive in their nature – they require action and going beyond the borders of the Union – both in physical and metaphorical terms.

Summarising, human rights presence in the external policy of the EU constitutional basis is determined by obligations to 'respect' and to 'promote and uphold'. The response to Williams' questions as to whether respect entails refraining from abuse or positive action should be affirmative.

The Union's context involving undertaking activities brings us to the second level of the analysis. The EU is to act – to shape the context whilst at the same time maintaining its (image of) values and interests and defending them. The question is: how is it to act?

Article 21 TEU provides us with a partial answer to this question:

'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.

The Union shall seek to develop relations and build partnerships with third countries and international, regional or global organisations which share the principles referred to in the first subparagraph. It shall promote multilateral solutions to common problems, in particular in the framework of the United Nations.'

attributed to human rights on international political stage that is in direct opposition to the image of human rights transmitted in the post World War II era.

²⁹² Despite the fierce debate on the issue at the WTO level. See for the core of the debate: Petersmann, Harvard Law School. Jean Monnet Chair. and Jean Monnet Program. and: Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann'

Article 21 TEU confirms the earlier conclusion about the obligation to act on the part of the European Union – it strongly states that the EU 'seeks to advance' the principles that are behind EU's creation. Secondly, it determines the EU's commitments to principles lying at the base of the Union's development – the Union is to be guided by principles of democracy (hence participation and transparency), rule of law (in this context perceived internally), human rights (especially their universality and indivisibility), equality and human dignity – all this in the context of the UN Charter and international law. For the attainment of the objectives of external action the EU is supposed to develop relations only with the countries which share the same principles (hence the essential elements clauses obligatory in EU agreements entered into with third countries). Article 21(2b) TEU reiterates the described obligations emphasising bigger efforts to be made.²⁹³ Also in external sphere, there is a requirement of consistency of actions (which immediately evokes the question: why not coherence).²⁹⁴ Overall, the EU, as far as the manner of realisation of the objectives is concerned, is bound by the principles that determine its actions internally. This statement reflects the previous considerations on 'externalisation' of the EU values.

As we saw in this section, it is extremely difficult to determine the exact function of human rights provisions in the basic constitutional texts of the European Union. They are, firstly and foremostly, underlying values which, for the purpose of operational action remains a declaration of fact, rather than intent. Secondly, they are to be treated as a principle behind actions – they are functional in determining the standard for activities undertaken by the Union and its institutions. Finally, they constitute one of the objectives which are to be pursued alongside with other policies' objectives with, however, one limitation. The EU clearly states that it is to contribute to the respect of human rights on equal basis with other international law entities – it is an obligation of means – not an obligation of result. Yet

²⁹³ Article 21(2b) TEU – 'The Union shall define and pursue common policies and actions and shall work for a high degree of cooperation in all fields of international relations in order to: (a) safeguard its values, fundamental interests, security, independence and integrity (b) consolidate and support democracy, rule of law, human rights, and the principles of international law.'

²⁹⁴ See: the general Article 7 TFEU and Article 21(3) TEU: 'The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union's external action covered by this Title and Part Five of the Treaty on the Functioning of the European Union, and of the external aspects of its other policies.'

The Union shall ensure consistency between the different areas of its external action and between these and its other policies. The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy shall ensure that consistency and shall cooperate to that effect.'

again, the means through which the EU is to pursue its human rights objectives come to the forefront.

2. The Treaty Architecture – Competence, Balance of Powers, and Institutional Setting

With reference to the constitutional design of the EU external human rights policy, the Treaty of Lisbon continues determination of the policy issue and accomplishes two objectives advocated by the critics. Firstly, the Treaty determines (albeit, arguably in a partial manner) competence of the Union with reference to human rights. It, therefore, adds to the determination of the division of powers between the European Union and the Member States. Secondly, it introduces particular institutional arrangements which are to improve the exercise of foreign and human rights policy.

The clear cut determination of the EU competence, especially in the area of external policy has been a long-lived postulate. The importance thereof has been emphasised especially against the background of the doctrine of implied powers that, depending on the EU CJ case law, would take a slightly different form.²⁹⁵ In particular, it responds to the Opinion 2/94²⁹⁶ and the limited competence on the part of the Union to entertain human rights objectives.

In doing so, however, the Treaty makers demonstrated a very incoherent approach. Possibly the only clear power has been granted to the EU, through Article 6(2) TEU, to accede the European Convention for Human Rights. Otherwise, in external and internal policy, the EU's human rights powers remain somewhat blurred.

Internally, the formally exhaustive division of competence between the states and the Union included in the Treaty on the Functioning of the European Union, Articles 3 -5, was supposed to prevent the free will, functional widening of their scope by the institutions and above all by the Court. It can be claimed that such architecture was to confirm the ripe form of the Union which in its design has taken an unprecedented form of a supra-national organisation and therefore continued to evolve in an unpredictable manner. Had human rights powers of the Union been of general nature, they would have been included in the list. Yet, this was

²⁹⁵ This is true especially with relation to the case law determining two different sources of the doctrine and powers – first one based on the existence of internal legislation and the second one based on the *effet utile*.

²⁹⁶ EU CJ, *Opinion 1/94*, [1996], ECR I-1795.

not the case, hence every single action undertaken by the Union needs to be equipped with a specific legal base. Articles 8 – 10 TFEU provide for such in the areas of equality, non-discrimination, and a range of social rights, yet these are possibly the sole mainstreaming clauses. At the same time, one could argue that Article 67(1) TFEU whilst obliging the EU to create the Area of Freedom Security and Justice as the complement to the Single Market, grants the EU the general competence to provide for the protection of fundamental rights. This is furthermore accompanied by Article 3(6) TEU (*ex Article 2 TEU*): 'The Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties.' The overall Lisbon Treaty picture does not convey the impression of completeness (and therefore coherence) of the EU internal human rights competence.

Possibly, the only cross-cutting horizontal provision of Treaty value concerning internal human rights refers to the Charter of Fundamental Rights and its implementation – but here fundamental rights act as the limit to the EU action; not as the basis for one. Article 51(2) of the Charter determines the fields of its application. It states:

'1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity, and to the Member States only when they are implementing the Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

2. The Charter does not extend the field of application of Union law beyond powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties'

The clear prohibition of going beyond what the Treaties provide for clearly prevents the possible development of comprehensive human rights policy on the basis of Charter's provisions. If this is so, how should one read the recommendation to the addressees of this paragraph? What is respecting of rights, observing principles, promotion and application thereof if not the general scheme of the policy? Finally, what remains is the long standing

question about the AETR doctrine and the distinction between internal and external competence inasmuch as its standing still prevails?²⁹⁷

The doubts uttered can be rather unequivocally refuted with the help of the Treaty text. For the Treaty of Lisbon, despite presenting a ‘patched’ approach to the EU internal human rights policy, has equipped the Union with a clear one in external field. There, according to Article 3(5) TEU, the EU is empowered to ‘promote and uphold’ its values and contribute to the protection of human rights. Or, in the wording of Article 21(2 a and 2b) TEU: ‘The Union shall define and pursue common policies and actions (...) in order to: Safeguard its values, fundamental interests, independence and integrity; Consolidate and support democracy, rule of law, human rights, and the principles of international law.’

The area of external action in its nascent, coherent, form is further defined by Article 21(3) TEU²⁹⁸. Under the Treaty of Lisbon it encompasses: CFSP, CSDP, Common Commercial Policy, Cooperation with Third Countries (Development Cooperation and Economic, Financial, and Technical Cooperation with Third Countries), and Humanitarian Aid, Restrictive Measures, and making of any international agreement ‘where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union’s policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act, or is likely to affect common rules or alter their scope (Article 216(1) TFEU).’ The codification of the doctrine of implied powers²⁹⁹ from the perspective of the organisation of the Treaty makes all of the areas of Union action part of the external action to which the obligation to pursue objectives envisaged in Articles 3(5) TEU and 21(2) TEU apply.

As a matter of illustration of the lack of difference in setting once the Treaty of Lisbon had been adopted, let us recall the UN Convention on the Rights of Persons with Disabilities. It

²⁹⁷ Cremona, ‘External Relations and External Competence of the European Union: the Emergence of an Integrated Policy’ at 218.

²⁹⁸ ‘The Union shall respect the principles and pursue the objectives set out in paragraphs 1 and 2 in the development and implementation of the different areas of the Union’s external action covered by this Title and Part V of the Treaty on the Functioning of the European Union.’

²⁹⁹ See: Article 216 TFEU following the specifications outlined by the EU CJ: *CJEU, Opinion 1/03 on the accession to the Lugano Convention*, [2006], ECR I-1145.

does not seem that the decision about the legal basis under which this agreement would have been made, had been different under the Nice Treaty.³⁰⁰

Hence, on the face of it the Treaty of Lisbon changes of competence arrangements does not seem to have much of an impact on practice of making external human rights instruments. It remains to be seen how will the EU make use of the general external human rights competence which surprisingly does not stretch on internal sphere of its activity.

Similarly, it remains to be seen whether the Member States of the Union will accept the general competence in EU external human rights matters as the basis for the control of their actions. Can the altered external human rights setting affect the exercise of the constitutional principles of the European Union? In the light of a very unclear internal competence context, it seems that there is not much potential for the EU to discipline its Member States when they act abroad. Consequently, clearly pre-emption will not take place (unless on the legal basis connected with a different policy field) solely on human rights grounds; it is also highly unlikely for the EU to use the principle of loyal cooperation against its Member States in this context.

The last accomplishment of the Treaty of Lisbon with relation to the external human rights policy is creation of the European External Action Service ('EEAS') and the Union High Representative for Foreign and Security Policy ('High Representative'). Yet both the scope of the competence assigned to the HR and the composition of the EEAS reflect the problems outlined above and brings further ones to the light. The open architecture of the EEAS has permitted the maintenance of the pre-Lisbon inter-pillar and post-Lisbon division between the CFSP and other areas of Union activity.

Indeed, the publications on the EEAS³⁰¹ emphasize that there are three groups of issues associated with the problematic nature of the new institution and its very delicate position

³⁰⁰ The Decision of the Council was made 'Having regard to the Treaty establishing the European Community, and in particular Articles 13 and 95 in conjunction with the second sentence of the first paragraph of Article 300(2) and the first subparagraph of Article 300(3) thereof (...)' and therefore with relation to the strong non-discrimination legal basis (Article 19 TFEU) and the approximation of laws clause (Article 114 TFEU). See: Council Decision of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities (2010/48/EC), OJ (2010) L23/35.

³⁰¹ See especially: Steven Blockmans and Marja-Liisa Laatsit, 'The European External Action Service: Enhancing Coherence in EU External Action?' in Paul James Cardwell (ed), *EU external relations law and policy in the post-Lisbon era* (T. M. C. Asser, Springer 2012) Steven Blockmans and Leendert Erkelens, 'Setting up the European

distorting the balance of powers within the European Union. Firstly, there appeared a question of the actual task of the EEAS and its relation to other institutions; secondly, there were doubts about its composition and procedural functioning; thirdly, the position of the EEAS to provide a lead in external policy matters. Clearly, all the three issues will have an effect on the EU external human rights policy which shall be demonstrated in Part II of this study. In terms of the institutional changes, what draws attention apart from the appointment of the High Representative for Foreign and Security Policy of the European Union is the appointment of the EU's Special Representative for Human Rights in the person of Mr. Stavros Lambrinidis³⁰². The tasks of the Special Representative are fairly limited and encompass his contribution to the current policy, its implementation and coherence as well as enhancement of dialogues with third countries' governments and regional organisations.³⁰³ It is notable that the EU's Special Representative for Human Rights is neither a well known politician, nor does he wish that his activities are very visible.³⁰⁴ The body responsible for implementation of the mandate remains the European External Action Service under the leadership of the High Representative.

Inasmuch as the Treaty of Lisbon provides for the three major, above described institutional reforms, the changes from the point of view of the EU external human rights policy are only a tip of the iceberg. Soon after her appointment did the High Representative initiate the consultation process aiming at reshaping the EU external human rights policy; activity which brought about further changes; complementary to the ones that took place on the basis of the Treaty of Lisbon. Their more detailed analysis can be found below in Part II of this study; for now let us see what was the substantive result of the process of reshaping of EU external

External Action Service: An institutional act of balance' 1 CLEER Working Paper Bart Van Vooren, 'A legal-institutional perspective on the European External Action Service' 7 CLEER Working Paper Olaf Osica and Rafał Trzaskowski, 'Europejska Służba Działań Zewnętrznych. Implikacje dla instytucji i stosunków zewnętrznych Unii Europejskiej' 2 Nowa Europa Przegląd Natoliński Steven Blockmans and Christophe Hillion, *EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (February 2013).

³⁰² For limited information on the Special Representative and the actions he has undertaken since his appointment on 25 July 2012, see: http://eeas.europa.eu/policies/eu-special-representatives/stavros_lambrinidis/index_en.htm.

³⁰³ See: Article 3 (Mandate) of the COUNCIL DECISION 2012/440/CFSP of 25 July 2012 appointing the European Union Special Representative for Human Rights.

³⁰⁴ See the website: http://eeas.europa.eu/policies/eu-special-representatives/stavros_lambrinidis/index_en.htm, (accessed on 30 June 2014), note that the bureau of the EU Special Representative comprises 5 employees making it hardly possible for him to address even a fraction of external human rights related initiatives of the EU. See: http://eeas.europa.eu/policies/eu-special-representatives/stavros_lambrinidis/docs/team_lambrinidis_en.pdf, (accessed on 30 June 2014).

human rights policy and the manner in which it affects both the perception of institutional changes and of the use of instruments.

III. Identifying the Issue and Policy Analysis – Strategic Approach to Human Rights in EU External Policy

It was a direct consequence of the Treaty of Lisbon institutional changes that the discussion about revisiting of EU external human rights commenced. The High Representative for Foreign and Security Policy, Catherine Ashton, initiated the more or less formalised consultations already in 2010.³⁰⁵ What followed was the stream of recommendations, speeches, letters, and other documents authored by EU institutions and civil society organisations with the view to producing the most comprehensive strategy possible.³⁰⁶ Yet, the first informal draft of the HR's and Commission's Communication circulated in October 2011 was particularly harshly criticised.³⁰⁷ There were two reasons for this: the first one was procedural, second one substantive; and as it seems the former affected the latter. Procedurally, the problem lied in the timing. The first informal draft of the Communication

³⁰⁵ Catherine Ashton, *Speech to the European Parliament on Human Rights* (16 June 2010)

³⁰⁶ European Parliament, *Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's Policy on the Matter (2010/2202 (INI))* (2010) Catherine Ashton, *Speech to the European Parliament on Annual Human Rights Report* (15 December 2010) European Parliament, *European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI))* (2012) Also the recommendation by the European Parliament to improve the monitoring mechanisms and application of conditionality: European Parliament, *EU External Policies in Favour of Democratization* (16 June 2011) For information on discussions within the Subcommittee on Human Rights, see also the letter of the Chair: Barbara Lochbihler, 'Editorial: Human Rights and Democracy: Waiting for the «silver thread» to become visible and credible - Letter to the High Representative Catherine Ashton of 27 October 2011' OPPD Newsletter: News - Strengthening Parliaments Worldwide <http://www.europarl.europa.eu/pdf/oppd/Page_1/newsletter2011-12.pdf> , accessed on 9 November 2013. For discussions of the adopted strategy see: Beata Faracik, 'Human Rights and Democracy at the Heart of EU Actions, i. e. 'EU Strategy for Human Rights in External Action' Policy Papers of Helsinki Foundation for Human Rights Gosia Pearson, 'Landmark revision of the EU's human rights and democracy policy 2012 ' Policy Papers of Helsinki Foundation for Human Rights For NGOs positions, see: Human Rights & Democracy Network, 'European Parliament: A more Consistent and Coherent Approach on Human Rights and Democracy is Needed' <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/2b_hrdn_/2b_hrdn_en.pdf> , accessed on 9 November 2013, Human Rights & Democracy Network (Troika), 'HRDN response to the adoption of the new EU human rights package by the Foreign Affairs Council on June 25' <<http://lastradainternational.org/lisidocs/HRDN%20statement%20on%20EU%20human%20rights%20package.pdf>> , accessed on 9 November 2013.

³⁰⁷ For a detailed reconstruction of the exchange of comments and opinions concerning the first informal draft of the Communication, see: Faracik, op. cit. at 2. It is important to note that the policy paper had been written before the actual strategy was published reflecting the whole range of substantial wishes as far as the policy was concerned as well as the inter-institutional struggles inasmuch as which of the institutions is to play the bigger role in the process. Effectively, as it may seem, the struggle have taken place on the line Commission and the High Representative *versus* the European Parliament.

was apparently delivered to the European Parliament and the Member States at least on 18 October 2011 making it very difficult for the authors of the Communication to take into account all the comments made by the stakeholders in the brief period preceding the actual adoption of the Communication on 12 December 2011.³⁰⁸ Substantively, because the stakeholders did not manage to make their voice heard, the Communication was described as lacking a fresh look at the role and standing of human rights in EU external relations.

Nevertheless, the Communication³⁰⁹, labelled as the beginning of the discussion on what was to become the Strategic Framework to be adopted on 25 June 2012³¹⁰, was published by the High Representative together with the European Commission on 12 December 2011. Catherine Ashton emphasised, by now famously, that ‘the protection and promotion of human rights is a silver thread running through all EU action both at home and abroad’.³¹¹ The ‘silver thread’ metaphor for human rights is used interchangeably with ‘guiding principle’ which is to be translated into a ‘joined up approach to policy’³¹². Such description does not give the answer as to how human rights are to be treated in the wider scheme of the foreign policy of the European Union. The Communication could be described as yet another window-dressing approach, had it not been for the subsequent actions and a number of rather interesting proposals.

The document succeeds in addressing the policy challenges and emphasising principles to be employed. Unfortunately, the effort manifested by the High Representative and the

³⁰⁸ And as it seems there were many valuable contributions made as early as in 2010. See, for instance: Parliament, *Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's Policy on the Matter (2010/2202 (INI))* Danish and German Governments presented their comments as early as in March 2010 following a meeting in Gymnich: Danish and German Governments, ‘Food for Thought Paper: Speaking with One Voice on Human Rights and Global Values’ <<http://www.ft.dk/samling/20091/almindel/euu/bilag/417/861523.pdf>> . accessed on 9 November 2013. On the process, see also: Roberta Dirosa, ‘Human Rights Priorities of the Belgian Presidency 2010’ <<http://www.docstoc.com/docs/74143419/Human-Rights-Priorities-of-the-Belgian-EU-Presidency>, <http://www.boell.de/de/navigation/europa-transatlantik-10611.html>> , at 5, accessed on 9 November 2010. NGOs, apart from commenting on the strategy as early as in 2010 (see, for instance: FIDH, ‘Contribution to the Informal COHOM dedicated to the strategic review of the EU human rights policy’ <<http://www.fidh.org/en/FIDH-Contribution-to-the-Informal>> , accessed on 9 November 2013) had the chance to provide their feedback during the EU-NGO Forum held in July 2010 (Lyal S. Sunga, *Report: EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward* (2010)).

³⁰⁹ Joint Communication to the European Parliament and the Council ‘Human Rights and Democracy at the Heart of EU External Action – towards a More Effective Approach’ of 12 December 2011, COM (2011) 886 final.

³¹⁰ EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

³¹¹ Joint Communication ‘Human Rights and Democracy at the Heart of EU External Action – towards a More Effective Approach’, at 4.

³¹² Ibid at 10ff.

Commission has not been much elaborated upon in the process of drafting of the 'EU Strategic Framework and Action Plan on Human Rights and Democracy' that was adopted by the Council on 25 June 2012. The following sections will present the policy approach of the Union with respect to the EU external human rights policy and indicate which issues have been indicated of prime importance and how, subsequently they are to be put into life according to the Strategic Framework.

It is important to note that the Communication starts off with an assumption that human rights **as enshrined in international treaties** are the basis for the EU action; it is the EU responsibility to implement them.³¹³ This approach confirms the universality of the object of the policy: it is the concern of the EU to make human rights reality in their universal, indivisible form through the most effective (in a given context) means. At the same time, the binding character of the EU Charter for Fundamental Rights and the imminent EU's accession to the European Convention for Human Rights are recognised as direct triggers for the revisiting of the total of the EU external human rights policy.³¹⁴

The Communication, in fact, focuses on revisiting mechanisms, processes, and structures. The proposals are made in a very diplomatic manner emphasising four areas through which responses to human rights challenges are addressed.

‘– On external delivery mechanisms – would not a bottom-up, tailored, country-based approach, coupled with cross-cutting worldwide campaigns on specific themes achieve better the human rights and democracy objectives?

– On process – how can the EU become more joined up across the whole range of its policies and Institutions, and externally when working with international partners, NGOs, regional groupings and international organisations?

– On internal structures – should we place priority on the completion of a network of human rights and democracy focal points across EU Delegations worldwide, and a standing capability in the Council on external human rights and democracy issues?’³¹⁵

Therefore, the EU in order to address the challenges is to:

³¹³ Ibid at 5: ‘The Universal Declaration of Human Rights sets international standards for all UN Member States. Every UN Member State is a party to at least one of the six major human rights treaties that the Universal Declaration has inspired, with 80% of states having ratified four or more. And ratification continues at a steady pace. In the area of human labour rights, the eight Core Labour Conventions of the ILO have achieved a high ratification rate worldwide including full ratification by all EU Member States. A global legal framework therefore exists: the real challenge lies in ensuring its implementation.’

³¹⁴ Ibid at 7.

³¹⁵ Ibid at 7.

- (1) Focus on the delivery of human rights through tailoring approaches to specific needs in the field and specific countries; the delivery is to be done following a campaign-based approach in close cooperation with civil society and on the basis of reciprocity³¹⁶;
- (2) Provide for a joined up approach to policy where democracy and elections, development cooperation, human rights clauses, trade policy, information and telecommunications policy, business and human rights, conflict prevention, crisis management, counter-terrorism, freedom, security, and justice are to work take a 360 degrees coherent approach from human rights policy perspective;
- (3) Build strong partnerships through multilateral cooperation, contributing to international justice, developing cooperation with regional organisations, making impact through dialogue, and responding to serious violations.
- (4) Create an internal human rights synergy for human rights through involving European Parliament, Member states, creating a standing capability on human rights and democracy in the Council of the EU, and building a culture of human rights and democracy.

Roughly, the above described responses on the part of the EU correspond to the various facets of incoherence as described in Chapter 1. The tailor based approach (1) explains the vertical incoherence in treatment of third countries. In fact, the Communication addresses this issue, albeit in a veiled, example-based, manner:

‘Thus, while the overall objectives of the EU’s human rights and democracy policy remain valid and unaltered, an approach that seeks to match objectives in a country with the realities on the ground is more likely to deliver concrete results than a one size fits all approach. Tailor made country strategies covering human rights and democracy should therefore be an integral part of the EU’s overall strategy towards that country. This will help to prioritise and rationalise work, especially of EU Delegations and Member State Embassies, whilst better drawing on the relevant mix of EU tools and instruments and working in the areas most likely to deliver lasting improvements and change. **That is not to say that the EU should, not for example, condemn the use of the death penalty in a country that continues to apply it, rather that this should not be the sole focus of EU human rights work when other areas might deliver change.**’ (emphasis added)³¹⁷

³¹⁶ See: ‘A new approach with neighbours and beyond’: ibid at 9.

³¹⁷ Ibid, at 8.

The joined up approach (2) reflects the need for horizontal coherence amongst various policies, whilst creating an internal synergy for the benefit of human rights (4) refers to the internal/external divide both in their horizontal (difference in policies) and vertical (different treatment of 3rd countries *versus* the Member States).

Building strong partnerships for human rights internationally (3) refers to the widely understood tools that are to be used for the pursuit of human rights objectives. Defined in an imprecise manner, they recognize, however, the pro-active approach where the EU is to create partnerships; and reactive approach where it is to respond when things go wrong. It is clear that the HR and the European Commission have identified policy issues in line with the standing criticism against the EU external human rights policy.

Whilst the Communication amounted to an invitation to a general discussion on human rights in EU external policy, it is the EU Strategic Framework and Action Plan on Human Rights and Democracy³¹⁸ that determined in concrete terms what is both the general vision of the policy and what are the objectives. In addition, it announces the appointment of the EU Special Representative for Human Rights Policy. The value added of the document is undisputable inasmuch as it is a first ever to address the total of human rights external policy in a comprehensive manner. As it seems it meets the demand for such an address through basing the general vision of the policy on three pillars:

(1) making the external human rights policy an integral part of all – without exception – policies of the EU³¹⁹, yet with particular attention paid to its priorities³²⁰;

(2) making human rights a joint responsibility: of EU institutions; EU and its Member States, and EU and its partners – both in bilateral and multilateral settings³²¹;

³¹⁸ EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12)

³¹⁹ Ibid, at 1-2; sections: *Promoting the Universality of human rights, Pursuing coherent objectives, Human rights in all EU external policies.*

³²⁰ Ibid, at 2-3. Amongst the priorities the EU refers to the substantive areas it has advertised as its focus for more than 15 years: promotion of rights characteristic for democratic states (freedom of expression, opinion, assembly and association, both on-line and offline), promotion of non-discrimination (especially freedom of religion or belief), promotion of economic, social and cultural rights, advocate the implementations of solutions on business and human rights, in particular the UN Guiding Principles on Business and Human Rights; the EU will continue to combat death penalty and torture; it will promote fair trial and rule of law as well as observance of international humanitarian law. The EU will continue to support international criminal efforts as well as human rights defenders. It will also continue to support civil society through the EIDHR.

³²¹ Ibid, at 3-4; sections: *Working with bilateral partners, Working through multilateral institutions, The EU working together.*

(3) giving a face to the human rights policy by announcing the appointment of the Special Representative for Human Rights.

The vision of the after all existing human rights policy seems splendid; the only problem is that it is to be placed on the top of existing instruments – within a well-established field. The obvious focus is placed on 97 actions under 36 headings that follow such vast vision. Do they really bring something new to the field? If we analyze the proposed actions, what emerges is the following picture³²²:

1. The vast majority of the initiatives concern the implementation by the EU both for its internal and external purposes of international standards originating from the international forums.³²³ Internally they are to be translated into guidelines; externally either into actual initiatives or positions that are to be taken by the EU when acting multilaterally or bilaterally.
2. There is a big emphasis placed on assessment of implementation³²⁴, subsequent learning and accountability mechanisms that are reflected in the Strategy wording as impact assessments, benchmarks, planning, evaluation and reporting.
3. The importance of institutional aspects of implementation of the Strategy are recognized. Actions aiming at achieving synergy in activities undertaken by institutions, Member States³²⁵ and EU partners are complemented by training and tools offered to EU officials working in the area³²⁶.
4. ‘Effective use and interplay of EU external policy instruments’³²⁷ referring to the better development of working methods ranging from dialogue, targeted support, incentives, and restrictive measures receives somehow little attention partially because

³²² A more detailed analysis of each of the groups will follow in Part II of this study.

³²³ See in particular: Outcome II. Promoting the Universality of Human Rights (4) Universal Adherence; the majority of actions under Outcome V. Implementing EU priorities on human rights; and obviously Outcome VII. Working through multilateral institutions.

³²⁴ See for instance: Outcome I. Human rights and democracy throughout EU policy – especially Impact Assessment for legislative and non-legislative proposals (1); Regular assessment of implementation (3); Outcome IV. Human rights in all EU external policies – Working towards a rights based approach to development (10).

³²⁵ See in particular: A standing capability on human rights and democracy in the Council of the EU (7), Effective burden sparing in the UN context (35).

³²⁶ See *inter alia*: A culture of human rights and democracy in EU external action (5).

³²⁷ See: Heading 33 of the Strategy.

it is addressed indirectly through other headings; partially because the focus of the strategy is reflecting inadequacy of human rights toolbox the EU has at its disposal.

5. The Strategy, finally, recognizes the insufficient knowledge lying at the disposal of the EU; it also identifies the loopholes of the policy (albeit there are not many of them) and advocates patching them.³²⁸

It is rather telling that over 30 of the headings put forward in the Strategic Framework refer to the implementation of international standards and ensuring compliance with them by the European Union itself. The document is truly about the European Union facing the various facets of incoherence and defending itself against criticisms. It does so above all through making the principles such as legitimacy, transparency, accountability, evaluation and learning operational. The tools through which this objective are attained are a mix of the established 'dialogue, targeted support, incentives, and restrictive' measures and the internally applicable soft measures that are reflecting the internationally advocated standards.³²⁹

This overview gives us the idea as to what it is exactly that one needs to look for when addressing the issue of how this particular policy objectives are to be attained and where should we apply rule of law and other principles that emerged in this puzzle. The following, and last section of Part I, in this study will systematize the 'standing body of EU policy on human rights and democracy in external action' from the point of view of how each of those instruments are adopted and the legal effects they have. This systematization will permit us to perform the analysis of whether particular elements of the body at stake fulfil the classical, rule of law criteria standing behind accusations of incoherence as unfolded in the first Chapter of this study.

³²⁸ See, especially the analysis and reporting activities to be undertaken under Objective 6. Effective support to democracy, developing methodology to aid consideration of the human rights situation in third countries (11a), or action consisting in developing a list of 'priority countries and regions for future partnerships in the area of the fight against human trafficking.

³²⁹ The EU is, for instance, to develop four sets of public guidelines: concerning children in armed conflicts (19b), concerning LGBT groups (22a), freedom of religion and belief (23 a), freedom of expression (24). EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

IV. The Overview of the EU External Human Rights Policy Toolbox

The ‘instrumentarium’ making up the body of human rights policy in EU’s external action can be considered an established field. The available instruments in traditional perception are well summarised by Rosas:

‘At the level of instruments and legal norms, one can distinguish between so-called autonomous (unilateral) Union legal acts, on the one hand, and international agreements on the other. Relevant Union autonomous acts include regulations of a general nature instigating financing programmes for democracy and human rights, more specific instruments concerning a certain region or sector which may include a human rights-related component, instruments relating to unilateral trade preferences as well as decisions taken in the context of the Common Foreign and Security Policy (hereafter, CFSP). In fact, legislative acts imposing economic and financial sanctions (‘restrictive measures’) normally require a preceding CFSP decision. Sanctions are often, but far from always, based on binding UN Security Council sanctions resolutions.’³³⁰

Hence, on the one hand for the purposes of the external human rights policy, the Union uses international agreements – either bilateral or multilateral ones. As the Action Plan demonstrates, on the other hand, the EU can’t seem to get hold of what exactly this instrumentarium is. In parts of the document it is referred to as: ‘guidelines, toolkits and other agreed positions and the various financial instruments’³³¹; in other as ‘dialogue, targeted support, incentives, and restrictive measures’³³².

The above outlined discursive inconsistency in presentation of the EU external toolbox may be irrelevant from the practical point of view, however, illustrates the challenge of ensuring the coherence and taking on the leadership position building on the legacy of the slow development of the policy field. Yet, on the basis of the actions undertaken as the follow-up to the Action Plan we can identify what the EU itself perceives as fundamental part of the body of the EU external human rights policy. Furthermore, given that our ultimate search follows the rule of law path, we will be able to systematise the instrumentarium in a manner which will permit us the swiftest analysis of the toolbox from the rule of law principles perspective.

³³⁰ Rosas, ‘Is the EU a Human Rights Organisation?’ at 11.

³³¹ Introductory phrase to EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

³³² Ibid, objective 33. Effective use and interplay of EU external policy instruments.

The analysis is based on the EU Annual Report on Human Rights and Democracy in the World in 2012 which outlines the actions undertaken by the Union on the basis of the 2012 Action Plan and points to the instruments that were chosen as implementing measures.³³³ Amongst the actions, in part, in line with Alan Rosas's distinction, we should distinguish:

- Unilateral Measures that are adopted for internal purposes whose addressees are Member States and the EU institutions (guidelines and regulations implementing international standards); their external component consists in their applicability to the EU institutions actions when performed in the realm of external policy;
- Unilateral Measures that are adopted for external purposes directed at third countries and civil society both within the EU and outside of it (financial instruments, trade measures, sanctions, diplomatic measures including those taken in order to act on the international forums);
- Bilateral and multilateral measures (chiefly international agreements but also regional policies instruments and human rights dialogues).

Let us introduce those instruments briefly before they are analysed in depth from the point of view of rule of law principles referring to their adoption, application and available recourse to judicial measures that will ensue in the Part II of this study.

A. Unilateral Measures that are adopted for internal purposes whose addressees are Member States and the EU institutions

Unilateral measures taken by the European Union for internal purposes are clearly those that have been adopted in order to make amends for the external-internal divide. Whilst on the one hand this group of instruments is of lesser importance from the point of view of this study, they shall be regardless analysed from the point of view of the set criteria. Such analysis may be the entry point to the conclusion that inherently any policy of the Union may be guilty of similar crimes as the EU external human rights policy.

Those instruments include the following:

³³³ See Annex I for the detailed analysis which instruments fall within which category.

- Guidelines (for instance on impact assessment, freedom of speech, freedom of religion and belief) directed at the EU institutions (either all of them or particular ones of them) acting internally and externally;
- Reporting, assessing, methodology and knowledge building, planning and programming documents that complete the strategic EU external policy framework in both substantive areas (i. e. death penalty) and with regard to geographic regions or concrete states.

Generally speaking we are moving here within the discretion area left to the institutions so that they can ensure that their capacity is sufficient in order to meet the set goals. Interestingly, progress on development of those instruments is infrequently put at display, leaving this inward looking body of EU external human rights policy chiefly to the intra- and inter-institutional dealings.

B. Unilateral Measures that are adopted for external purposes directed at third countries and civil society both within the EU and outside of it

This group of instruments includes the following:

- Unilateral trade measures such as GSP plus incentive arrangement;
- Legislative instruments adopted in order to implement international human rights norms.
- European Instrument for Human Rights and Democracy as the flagship financial instrument dedicated solely to attainment of human rights purposes;
- Other financial instruments functioning for the purposes of specific policy fields such as the European Neighbourhood Policy Instrument or TAIEX used in the enlargement context;
- Sanctions adopted in the form of Council's decisions.

All of the above instruments though adopted in internal EU context, produce effects for external actors and as such constitute much more of a genuine foreign policy tools than the ones included in the first group. The first four of the analysed instruments are adopted in the form of regulations which makes them subject to internal rules of the EU that apply to all

unilateral EU measures regardless of where do they produce their ultimate effects. Obviously the process of their adoption is of interest and its politics resembles that of adoption of sanctions. Clearly those regulations as a part of the former Community tools are very much different in terms of the context from the CFSP measures.

C. Bilateral and multilateral measures

The last group of instruments subject to our analysis consists of:

- International agreements whose object is human rights;
- International agreements and contained therein human rights clauses;
- Multilateral policy frameworks based on soft law arrangements such as action plans used for the European Neighbourhood Policy or conditionality of the enlargement process.

The last group indicates the context within which other tools function and for this purpose proves that the general notion of a policy tool cannot be considered in a particular; outside of the context manner.

Let us proceed now to the analysis of each of the instruments from the point of view of rule of law.

Part II – Instruments of EU External Policy Under the Rule of Law Scrutiny

*Throughout the world,
women and men demand to live lives of
liberty, dignity and security
in open and democratic societies
underpinned by human rights and the rule of law.³³⁴*

Part II of this study focuses on with **what is analysed** within the ambit of the EU external human rights policy. It offers a systematic analysis of the external human rights policy instruments in the light of rule of law principles identified in Chapter 2. The results of the analysis will be put into perspective through two means.

Firstly, they will need to be set against the wider policy framework (offered by the preambular text of those instruments). This approach will permit us to evaluate how much of the actual policy falls within the scope of traditionally imposed rule of law paradigm. The broader policy framework provides a wealth of information as to what are the purposes - and conflicting at times objectives – need to be fulfilled within the scope of a given policy instrument.

Secondly, the perspective that needs to be taken into consideration is that of the legal sphere where those instruments are both created and subsequently function. It is of importance for the purposes of this study whether the creation of those instruments exhausts the possibilities offered by legal systems. In other words, it is of importance whether the European Union and the international legal systems permit for taking the rule of law paradigm further; alternatively: whether these legal systems and their limits force EU institutions to seek creative solutions and alternative routes in order to attain policy objectives.

The fact that we are dealing here with instruments that operate at the border line between the EU internal legal system and the external international legal system adds to the analysis at least two additional angles. On the one hand, it required that the applied rule of law principles are of more generic nature; such that could be applicable both to the internal and external sphere. Chapter 2 contains a lengthy analysis of which principles should be taken

³³⁴ EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

into consideration, there is no need to repeat them here. Yet, the mere need to search for such set of rule of law benchmarks that would be applicable to this particular legal context illustrates very well the difficulty of understanding and evaluating any external relations legal and policy sphere. As such, it echoes the internal-external policy divide³³⁵, ³³⁶, incoherence that has been diminished largely after the adoption of the Lisbon Treaty. Still, this incoherence will continue to exist as long as there are doubts as to the EU general competence in the area of fundamental and human rights and the self-standing character of the Charter for Fundamental Rights.

At the same time, wherever legal systems intersect it frequently occurs that what is permitted in one legal system cannot be realised in another one. This is where limits of legal systems at stake force innovation and creativity on the part of legislators and executors. In particular, as we know from the case law of the CJEU '(w)ith regard to the implementation of the provisions of the Treaty, the system of internal Community measures may not (...) be separated from that of external relations.'³³⁷

Human rights policy internally is intertwined strongly with ensuring the rule of law within the EU's realm. The rule of law internally is manifested by ensuring sufficient guarantees of the state (or as in this case – the EU and the MSs) being bound by human rights in an equal manner, that they are transparent, clear and accessible, and, finally, that the power of the EU and its MSs is not exercised arbitrarily.³³⁸ Externally, as we have seen none of those

³³⁵ For example: Amnesty's International Report 2009 referred to the lack of attention on the part of the European Community to the consequences of the world financial and economic crisis on the state of human rights in the world and therefore criticised the EU for lack of flexibility and short-sightedness in this respect. See: Amnesty International Report 2009 accessible at < <http://thereport.amnesty.org/en/>> accessed on 29 May 2008.

³³⁶ See: ANDREW J. WILLIAMS, *EU human rights policies : a study in irony* (Oxford University Press. 2004), KIRSTEN LAMPE, *Human rights in the context of EU foreign policy and enlargement* (Nomos 2007), PHILIP ALSTON, et al., *Human rights and development : towards mutual reinforcement* (Oxford University Press 2005), MIELLE BULTERMAN, *Human rights in the Treaty Relations of the European Community : real virtues or virtual reality?* (Intersentia; Hart 2001)., PHILIP ALSTON, et al., *An 'ever closer union' in need of a human rights policy : the European Union and human rights* (Harvard Law School 1999), FRANK HOFFMEISTER, *Menschenrechts- und DemokratieklauseIn in den vertraglichen Aussenbeziehungen der Europäischen Gemeinschaft = Human rights and democracy clauses in EC agreements with third states* (Springer 1998).

³³⁷ *CJEU, Case C-22/70, Commission v Council (AETR)* [1971] ECR 263.

³³⁸ Simon Chesterman, 'Rule of Law' Max Planck Encyclopedia of International Public Law, online edition. See also Williams who framed the rule of law as one of the elements of the ethos of the European Union and concludes. He concluded that even within the EU legal realm the new conception of the rule of law, though needed, has not been developed:

guarantees apply, yet the internal process of the Union does follow principles derived from the broadly understood rule of law enriching them with further ones both characteristic of the legal system of the EU (such as the direct effect or principles of supremacy and proportionality) and operational ones referring to instruments this system has developed for the attainment of its goals (participation, local ownership etc.). Externally, outside of the EU realm the conditions of the rule of law do not apply in the same manner – they are different, yet reflect similar principles (disputed widely in the literature)³³⁹, since they apply to other entities – predominantly states and international organisations. The mentioned principles encompass the non-arbitrariness in the exercise of power (and thus principle *pact sunt servanda*, and the general trend to establish legal bodies, entities subject to rules, international organizations etc.), supremacy of the law thus created (hence the principle of within the law of the EU), and finally: the equality before the law (bringing us back to the discussed before issues of double standards and coherent use of the policy). These are basic principles applicable in the relations between entities of international law – which are, in human rights language, sovereign actors and main duty bearers.

At the same time, the area of human rights carries with itself particular challenges. Firstly, the binding international legal human rights framework exists – the challenge is to force states to observe it. There, the international agreements which have the highest legal status

'The reliance and emphasis placed on law has built an unspoken acceptance of notions of modern Western law and its processes so as to establish order, clarity and a degree of certainty for the settlement of disputes and for planning by those constituents who are affected by its application. It enables expectations to be given some degree of shape. This is a common attribute ascribed to law across a range of legal philosophies. Even amongst legal pluralists or post-modern analysts there is recognition that the force of law necessitates a degree of certainty within at least local or systemic parameters. Otherwise, the charge of arbitrary decision making is raised to undermine the whole premise for a particular system of law and the political order over which it is supposed to rule.

But notwithstanding this necessary quality, law in the EU has had to evolve, as already suggested, within geographical, political, philosophical and constitutional environment that remains steadfastly conditioned by uncertainty to the point of indeterminacy. It has had to respond to significant debate and shifting patterns in political direction, in perceived threat, in economic conditions, in geo-politics, in demographics, and in constitutional structure. So we have law that has been provided with few constitutionally-fixed coordinates. How then can those values preferred politically and thus supposedly to be applied through law be protected so as not to go beyond reasonable uncertainty and become indeterminate in content and tone?

(...)

We appear to be no nearer a considered understanding of the contribution of law to the values and the make-up of the institutional ethos of the EU or vice versa. In particular, no captivating philosophy for the Union or of its law has emerged. And, more importantly, no developed discourse or established institution-specific theory of substantive justice has been evident.' Williams, *The ethos of Europe : values, law and justice in the EU*, at 13-14.

³³⁹ Chesterman, 'Rule of Law', *ibid.*

and binding force. But even if the external sources of law are to have the primary effect, they are in no way to be enforced internally if sovereignty is to be observed. And, above all, decisions about the enforcement of international agreements are down to political actors and processes.

If we think 'rule of law' type of instruments for the EU external policy, we should be looking for instruments which have the characteristics of the law – the legal rules are to determine the full process and all the options and have to be equally applicable to all entities with whom the EU has been maintaining relations. As such, the creation and the use of those instruments should be independent of political will on both sides of the relationship. This means that the architecture of such instruments should foresee some sort of review and accountability mechanism. Since, in almost all the cases human rights obligations included in cooperation agreements constitute reiteration of the earlier made commitments, this requires participation of third countries in the development of the commitment of the third country that takes place³⁴⁰ in a transparent manner.

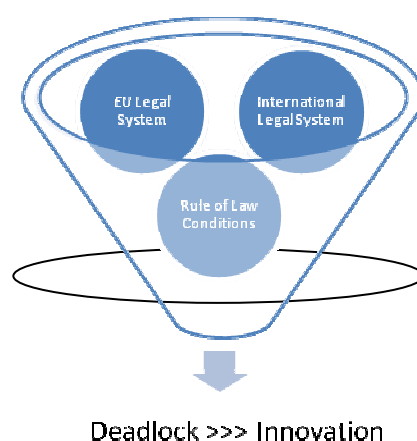
Judging from the literature on the subject³⁴¹ these are the qualities of the external human rights instruments we are looking for, and this is a premise from which their use has been evaluated. In other words, when human rights are concerned, especially if we speak about the historically long lived abusers such as the European Union and its Member States, we no longer accept the international law framework which seems way too weak for the type of obligations at stake. The Union, is expected and, at least according to its own rhetoric: wishes to act as a human rights enforcement agency. It has taken the functional approach and has been taking the rule of law in international relations more and more seriously, yet within the limits of what can be done imposed on it by its own legal order. What resulted, is an evolving matrix of instruments which attempts at fulfilling the above described characteristics, whilst alleviating the negative effects of the above all internal political process, and enhancing the participation of external actors.

³⁴⁰ For the criticism of the universal and arbitrary approach to human rights as performed by the European Union see: PAIVI LEINO-SANDBERG, *Universality as Particularity - the Politics of Human Rights in the European Union* (The Erik Castrén Institute Research Reports 15/2005).

³⁴¹ See for instance: the analysis of the so-called Article 96 procedures in: LORAND BARTELS, *OP. CIT.*, ELENA FIERRO SEDANO, *OP. CIT.* and others.

The combination of the two sets of legal regimes marks the space within which the EU can act; the space to which the rule of law criteria devised for a less complex national systems normally apply. The architecture of this space has, as a consequence, two somehow contradictory phenomena: on the one hand, they do not permit to fulfil some of the postulates connected with the rule of law paradigm because of, what may be called, structural problems. On the other hand, this problem is amended for through proliferation of instruments that formally go beyond what the two legal systems permit without directly contradicting them. In other words, going beyond the set limits leads to deadlocks in some aspects and innovation in others.

Graph No 2: Rule of Law Sieve: from Deadlock to Innovation



The image of the sieve is to be kept in mind throughout the study brought about in the following chapters. Neither the international, nor the European legal systems are complete, therefore, they permit for a certain degree of flexibility. Flexibility is permissible only if it follows the principles entrenched with the process; process that follows a paradigm close to the rule of law, but possibly a broader one – the one that responds in a better way to challenges and demands of an altering foreign policy.

As any international actor the EU with reference to human rights (or any international law issue) has as its disposal unilateral measures which produce effects external to its legal order and international norms it creates in collaboration with other international actors – multilateral and bilateral instruments. Both sets of instruments either follow the requirements of the legal systems or whilst encountering the deadlock ‘sieve through’ the system through the use of informal forms of collaboration.

Hence the principles we are looking for should be found in the procedures the EU employs in the creation of the two types of instruments. Obviously their presence is in no means obscure and can be traced at various stages of those procedures as provided for by the two legal systems at stake.

On Methodology

Before moving on to the analysis of particular types of instruments through the lens of rule of law paradigm, I would like to make a comment on methodology of categorisation of instruments.

Analysing the fulfilment of the rule of law criteria by various instruments at disposal of the EU is a difficult task largely because much of what the institutions are doing lies beyond reach of an average citizen. One either needs to be there and conduct field research observing each step taken by delegations, or rely on staff's accounts. Both methods of gathering information frequently go beyond reach of experts conducting studies due to financial and political reasons. The assessment of the policy is usually based on the systemic data – rarely does it go into details of actual day-to-day practice.

This study focuses solely on what is a public information in the area of the EU external human rights policy. The choice of instruments described is drawn from the instruments mentioned in the 2012 EU human rights strategy; yet the particular aspects of instrument creation, application and conflict resolution are based on the availability of the information on the issue. Hence, for every single aspect, three instruments are selected which can be analysed through the basic lens of this study – rule of law paradigm. The complete overview of an instrument's practice would require a separate study – of a smaller scale; a study which may, in the future complement the present one.

The classification of the instruments draws on the 2012 EU Strategic Framework³⁴² and updated on the basis of the 2012 EU Human Rights Report³⁴³. It is the first comprehensive instrument produced by the EU institutions that demonstrates the total of EU external human rights initiatives. The classification distinguishes from the actions included in the Action plan unilateral instruments adopted for internal EU purposes and those adopted for external EU purposes and bilateral/multilateral. It identifies further two groups of actions whose objective is not to create a new instrument (i. e. guidelines), neither are they supposed to attain actions' objectives with the use of existing instruments (i. e. promotion of

³⁴² EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

³⁴³ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports).

a specific set of rights with the use of the European Instrument for Human Rights and Democracy).

These are, firstly, actions amounting to introducing institutional changes within the EU institutional structures; changes that needed to be introduced in order to facilitate the EU external human rights objectives. Such actions involve either creation of an additional body, or a section of body (such as the Brussels section of COHOM), conducting training sessions (usually directed at members of EU delegations and missions), or development of new arrangements in the manner the EU functions externally (for instance through rearranging collaboration with the Member States). The second group of actions (named 'Other' in the Annex) consists of actual events and initiatives that are obviously conducted within the budget and use of existing instruments, yet within their discretion. Examples of such actions include campaigning on specific issues or gathering and publication of contact details of EU human rights focal points. These actions, even though possibly much more interesting substantively, cannot be assessed from the procedural point of view and will not be, therefore, included in our analysis in a manner other than recalling their undertaking at the instrument enforcement stage.

Following a brief introduction of each of the types of instruments, their fulfilment of rule of law criteria will be tested on the basis of the criteria selected in the earlier part of this study. In order to illustrate the extent to which the rule of law criteria are fulfilled, with relation to each of the sets of criteria a set of three concrete instruments is selected which subsequently undergoes a more detailed scrutiny. The selection is guided by three considerations – firstly, the selected instruments together must give the broadest picture of how the rule of law principles are fulfilled; secondly, their selection is connected with the availability of written sources referring to them (this is particularly true for the application of instruments); finally, at the end of the analysis of each of the sets of instruments an attempt is made at presenting the fullest, yet condensed picture of the EU external human rights policy.

The analysis will follow the rule of law benchmarks concerning the creation and application of instruments at stake, yet with a slight modification. In order to avoid repetition, each of the chapters will be finalised with general observation on the role of the court in relation to

specific instruments. The section thus devoted to courts will encompass observations on the availability of judicial review both at the stage of creation and application of instruments as well as the accessibility of conflict resolution proceedings and enforceability of decisions.

Chapter 4 – Unilateral Instruments adopted for Internal Purposes Addressed at the EU Institutions and their Staff, Member States Foreign Ministries, and Other Actors

I. Setting the Scene

The category of unilateral instruments adopted for internal purposes of the European Union in relation with international obligations comprises many items. Yet, it largely gathers instruments adopted by the EU in reaction to the external-internal human rights policy divide. These instruments serve two general goals. Firstly, they contribute to an internal ‘capacity’ building for the purpose of attaining external human rights objectives. They facilitate institutions’ tasks in these aspects through gathering knowledge on human rights related problems, international standards and the thorough knowledge of policies and stages where such problems could be best addressed. Alternatively, they provide guidelines step-by-step indications for the institutions and their staff (and sometimes third parties as well) to follow when acting in external policy field. Secondly, the unilateral instruments directed at the institutions contribute to the image building of the EU as a human rights actor thus depriving the internal-external incoherence claim of its edge.

Table 3 provides the list of those activities following the 2012 EU Framework³⁴⁴ set against the background of what the EU has achieved since its adoption as provided for in the 2012 EU’s Human Rights report³⁴⁵.

³⁴⁴ EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12)

³⁴⁵ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports)

Table No 2 – Unilateral instruments (internal)³⁴⁶

STATE OF IMPLEMENTATION - 1 January 2014					
Objective	Instrument	Body Responsible	EU Document/Legal Act	Legal Act/Procedure	Addressee
1. Incorporate human rights in all impact assessments	Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2013) 567 final	Commission	Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2013) 567 final	Commission Staff Working Paper	Commission services
	Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy	Parliament	Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc No ST 9068 2013 INF7	Council	The Council of the European Union
	Guidelines on programming, design and management of budget support (Chapter 4 - Fundamental values)	Council	In the process of elaboration	-	All of the institutions
	Social due diligence standards	European Investment Bank	In the process of elaboration	-	European Investment Bank
3. Regular Assessment of implementation	Reports	ETAG	various	Joint Working document	all institutions
6. Effective support to democracy objectives	>> Democracy reports and plans of action on the first generation Moldova (Eastern Partnership) Kyrgyzstan (Central Asia) Lebanon (Southern Neighbourhood) Ghana, Benin, Solomon Islands and Central African Republic (ACP) Bolivia (Latin America) Mongolia, Philippines, Indonesia, Maldives (Asia)	ETAG and EU Delegations and the European Commission	>> According to the 2013 EU lifts Report, for 4 of the pilot countries the joint report has been produced following the reporting back from the delegations. The 9 countries involved: Benin, Bolivia, Ghana, Lebanon, Indonesia, Kyrgyzstan, Maldives, Mongolia and the Solomon Islands. The Central African Republic, Moldova and Philippines have not participated. >> Following the 2010 draft Council Conclusions there have not been adopted further conclusions on the subject	Joint Working document Note	Staff all institutions
	Development of EU joint comprehensive democracy support plans and programmes on the basis of the pilot countries' exercise outcome, for third countries where the EU is actively engaged in democracy support	ETAG, the European Commission	In the process of elaboration	NA	all institutions
	Systematic follow-up use of EU Election Observation Missions and their reports in support of the whole electoral cycle, and ensure effective implementation of their recommendations, as well as the reports of other election observation bodies (eg OSCE/ODHR)	Council ETAG Commission Member States	No data	NA	all institutions
	Development of a toolbox for HRBAO	ETAG European Commission Member States	Parliament Resolution of 20 October 2012: Agenda for Change: the future of EU development policy, 2012/2002 (HR) Instructions for the Programming of the 11th Development Fund and the Development Cooperation Instrument 2014-2020 adopted on 31 May 2012 Council Conclusions on increasing the impact of EU Development Policy: an Agenda for Change (136th Foreign Affairs Council Meeting, Brussels, 14 May 2012)	Parliament Resolution, Council Conclusions, EU Regulation	all institutions Member States
10. Working towards a rights based approach in development cooperation	Integration of human rights advocacy in external activities dialogue	ETAG European Commission		NA	Council of the European Union
11. Make trade work in a way that helps human rights	Develop methodology to launch human rights programmes together with launching new trade agreements	ETAG European Commission Member States	Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2013) 567 final	Staff Working Document	partner countries
12. Reflect human rights in conflict prevention and crisis management activities	Expansion of the catalogue of early warning system indicators to include human rights	ETAG	2010 Council's report 'Lessons and best practice of mainstreaming human rights and gender into CSOP military operations and civilian missions, 17134/1/10 REV 1	note	ETAG European Commission
	IR relevant benchmarking, planning, and evaluation and mandating of the missions accordingly	ETAG	Council Handbook: Mainstreaming Human Rights and Gender into European and Security Policy, 2008		EU Missions
	Operationalise the EU comprehensive approach on implementing UNSC resolutions 1325 and 1820 on Women, Peace and Security	ETAG EUSG CSOP missions Commission	Training modules - in the process of elaboration Conflict early warning system - in the process of elaboration and testing		Individuals in third countries
	Devise a mechanism for accountability in case of possible breaches of the Code of Conduct by operation or mission staff	ETAG Council Commission		NA	EU Missions
13. Strengthen human rights in counter-terrorism activities	Development operational guidance to ensure the consideration of human rights, and where applicable HRU, in the planning and implementation of counter-terrorism assistance projects with third countries, in particular as regards the respect of due process requirements (presumption of innocence, fair trial, rights of the defence)	ETAG CTC Commission Member States	In the process of elaboration	NA	all institutions
14. Ensure human rights underpin the external dimension of work in the area of freedom, security and justice (FSJ)	Develop a list of countries - partners in the area of human trafficking	Commission Anti-trafficking Coordinator ETAG	EU Strategy towards the eradication of Trafficking in Human Beings 2012-2016 Directive 2011/36/EU on preventing and combating trafficking in human beings	Communication	ETAG European Commission
17. Eradication of torture and other cruel, inhuman or degrading treatment or punishment	Integrate torture prevention measures into all FSJ activities, including those related to law enforcement cooperation	European Commission Member States	EU Guidelines on Torture, update of 20 March 2012, 6129/1/12, REV1, COMHOM 57, PISC 326	Council of the European Union	third countries
19. Promotion and protection of children's rights	Promote the establishment of up-to-date hazardous work lists (ILO, Article 6)	Commission Member States	EUROPEAN COMMISSION, COMMISSION STAFF WORKING DOCUMENT, Trade and Worst Forms of Child Labour, Brussels, 30 April 2013, SWD(2013) 173 final	Commission Staff Working Document	all institutions third countries

³⁴⁶ For the complete list of instruments, see Annex No 1.

20. Protection of the rights of women, and protection against gender-based violence	Implement the nine specific objectives of the EU plan of action for gender equality and women's empowerment in development 2010-15.	Member States Commission EEAG	EU Plan of Action on Gender Equality and Women's Empowerment in Development 2010-2015, 8 March 2010, SEC(2010) 265 final	Commission Working Document	all institutions
22. Enjoyment of human rights by LGBT persons	EU guidelines, building upon the EU's LGBT (lesbian, gay, bisexual, transsexual) toolkit.	Council	Guidelines to promote and protect the enjoyment of all Human Rights by lesbian, gay, bisexual, transgender and intersex (LGBTI) persons, 24 June 2013	Decision of the Council of the European Union	all institutions
23. Freedom of Religion or belief (v. implementing EU priorities on human rights)	EU Guideline on Freedom of Religion or belief (FoRb) building upon existing instruments and documents, recalling key principles and containing clearly defined priorities and tools for the promotion of FoRb worldwide.	Council	EU Guideline on the promotion and protection of freedom of religion or belief of 24 June 2013	Decision of the Council of the European Union	all institutions
24. Freedom of expression online and offline	Guidelines on Freedom of expression online and offline, including the protection of bloggers and journalists.	Council	Final draft of guidelines is undergoing consultation process	NA	all institutions
	Human Rights Impact assessment is present in the development of policies and programmes relating to cyber security, the fight against cyber crime, internet governance and other EU policies in this regard.	EEAG Commission	No data	NA	all institutions
25. Implementation of the UN Guiding Principles on Business and human rights	Implementation of the Commission Communication on Corporate Social Responsibility	Commission	NA	NA	all institutions, businesses in the EU and beyond
	Report on EU priorities for the effective implementation of the UN Guiding Principles	Commission	Three Guidance Handbooks: on Recruitment Agencies, ICT and Sex and GII	Handbooks published by the European Commission	all institutions Member States
	National plans for EU Member States on implementation of the UN Guiding Principles	Member States	In the process of elaboration	NA	Member States
26. Administration of justice	Continue to ensure monitoring of important human rights related trials, in particular trials against human rights defenders.	EU courts EU Delegations	NA	NA	all institutions
27. Responding to violations: ensuring accountability	Implement the updated Decision on the ICC (2011/198/CFSP), adopted on 21 March 2011 and the associated action plan, including by promoting ratification and implementation of the Rome Statute.	Member States EEAG Commission	High Representative of the European Union for Foreign Affairs and the Security Policy, European Commission, 'Joint Working Document on Advancing the Principle of Complementarity', of 31 January 2013, SWD (2013) 26 final Council of the European Union, Note from International Criminal Court Sub-area of the Public International Law Working Group (CICIL-ICJ) to the Delegations, 'The EU's response to non-cooperation with the International Criminal Court by third states', 14/983/13, COU II	Joint Working document Note	national judiciary, Delegations of the EU
30. Enjoyment of human rights by persons with disabilities	Development programmes, in the framework of the European Disability Strategy 2010-2020 and implementation of the UN Convention on the Rights of Persons with Disabilities	Commission EEAG	SIXTH DISABILITY HIGH LEVEL GROUP REPORT ON THE IMPLEMENTATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES, September 2013	Commission Working Document	Commission, UN
	Guidance Note on Disability and Development to be in line with the UN Convention on the Rights of Persons with Disabilities	Commission	EUROPEAN COMMISSION (DEVCO: D3 "SOCIAL AND HUMAN DEVELOPMENT & MIGRATION"), Guidance Note for EU Staff Disability Inclusive Development Cooperation (2013)	Commission Working Document	EU institutions staff
31. Impact on the ground through tailor-made approaches	Mainstreaming Strategy	EEAG Commission Member States	49 out of 140 human rights strategies were endorsed by the HSG; in December 2012 a follow up monitoring and implementation was launched	Council decision	EEAG Commission Member States
33. Effective use and interplay of EU external policy instruments	Further develop working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures.	EEAG Member States Commission	Debate opened	NA	all institutions

These instruments (even though named in a non-systematic manner³⁴⁷) can be divided into two broad categories: classical policy making and evaluation instruments (programs, plans, reports, impact assessment methodologies), and guidelines to be applied by the Union, its Member States and their officials and other entities³⁴⁸ in external activities³⁴⁹. The former group, in the EU jargon is referred to as the preparatory documents and as such figures in the Eur-lex depository; the latter are adopted by the Council following the approval by the

³⁴⁷ Compare: Guidelines vs Guidance Notes; Commission Working Document vs Commission Staff Working Document etc.

³⁴⁸ Such as businesses – see, for instance: Shift Institute for Human Rights and Business, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf> , at 7: '(the guide) is intended to help ICT companies translate respect for human rights into their own systems and cultures'.

³⁴⁹ See, for instance: Council of the European Union, 'EU Guidelines on the promotion and protection of freedom of religion or belief of 24 June 2013' at para. 8: 'The Guidelines explain what the international human rights standards on freedom of religion or belief are, and give clear political lines to officials of EU institutions and EU Member States, to be used in contacts with third countries and with international and civil society organisations. They also provide officials with practical guidance on how to seek to prevent violations of freedom of religion or belief, to analyse cases, and to react effectively to violations wherever they occur, in order to promote and protect freedom of religion or belief in the EU's external action.'

European Council. Importantly, both categories of instruments are in theory non-binding and, therefore, soft law measures. Yet, as far as they concern the institutions, the preparatory acts bind them imposing a specific standard of action. The acts of highest significance are those directed not only to the institutions themselves, but also to wider public.³⁵⁰ The importance of the audience will be raised again below and for this purpose distinguishing between two sets of instruments will be necessary. Given that the preparatory acts and guidelines take a slightly different route in the rule-making process, the analysis thereof shall be kept separate where necessary. It needs to be noted, however, that apart from related category of programmes and plans of action³⁵¹, the unilateral instruments did not serve the purpose of adopting legislative acts – importance of the difference will be vivid in the next chapter.

Let us proceed to the analysis of those instruments from the perspective of the aspired standard of rule of law. The analysis shall be illustrated with examples drawn from instruments represented in the Table No 2.

II. Rule of Law Principles Concerning Instrument Creation

When recalling standards of rule of law principles concerning instruments creation (non-arbitrariness, generality, prospectivity; transparency, clarity and the availability of judicial review), it is somewhat obvious that it may be easier to attribute characteristics of some of those principles to a given instrument than others. In the particular context of unilateral instruments that are adopted for internal purposes of the Union, the analysis of the presence of particular principles is made more difficult by the fact that the legal character of those instruments is still being explored. The recent scholarly analysis point, *inter alia*, to the manner in which constitutional setting affects those instruments.³⁵²

³⁵⁰ Shift Institute for Human Rights and Business, 'Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf> Shift Institute for Human Rights and Business, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' <http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf> Institute for Human Rights and Business, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'.

³⁵¹ See Action No 6 – Effective Support to Democracy Objectives.

³⁵² Deirdre Curtin, Herwig Hofmann and Joanna Mendes, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' 19 European Law Journal but also other contributions to Volume 19, Issue 1 of the European Law Journal.

Let us begin with the criterion of **generality** and **non-arbitrariness**. It is important to note that from the international law perspective all of the human rights instruments should be of general and non-arbitrary application. In fact, the majority of initiatives on the part of the Union are about importing the general and non-arbitrary norms into its legal system. Interestingly, through such importation the EU binds only itself and its staff with those norms thus above all emphasising the fact that it is also subject to them and that all of its agents are equally bound by them. Those norms, more than anything, contribute to the image creation of the EU adding to its identity on the international stage. Especially general guidelines³⁵³ and guides³⁵⁴ serve this purpose.

This having said, we need to pay a little bit more attention to both the form in which those standards exist in international practice and the manner in which the EU implements those acts. International standards are either embedded in international conventions to which the EU is a party (the UN Convention on the Rights of Persons with Disabilities), international conventions to which the EU is not a party (up till now European Convention on Human Rights), and international non-binding human rights related instruments (such as the UN Guiding Principles on Business and Human Rights). Whilst we shall deal with the implementation of EU's own international obligations stemming from international agreements in chapters below, the other two sets of standards are of more interest to our analysis at this stage.

Both through implementation of standards stemming from international conventions to which the EU is not a party and those coming from non-binding instruments, the EU becomes the part of the international community. Somehow as it seems, because this international community already includes the EU Member States, it is sufficient if the EU implements the standards in its own actions. In addition, given the non-binding nature of the very international standards, the EU is not compelled to use legal instruments which would surpass in their effects those on international level – instruments-sources of the said

³⁵³ Human Rights Guidelines on the EEAS website have a specific very visible sub-site: http://eeas.europa.eu/human_rights/guidelines/index_en.htm.

³⁵⁴ The mentioned above Sectoral Guides for Human Rights and Businesses. See: Institute for Human Rights and Business, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' Institute for Human Rights and Business, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights' Institute for Human Rights and Business, 'Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'.

standards. The question echoing the criticisms and the elevated expectations towards the Union comes to one's mind: could the EU go further in its mostly voluntary aspiration to join the international club of human rights actors? Of course it could³⁵⁵ - would a most straightforward answer be. Nevertheless, it does not seem so straight-forward. In pragmatic terms, whenever the EU is taking a unilateral action in binding terms, the question of the competence and the relationship with the Member States emerges. In other words – even if the elevated standards of the EU action were to concern only the EU institutions (as the guidelines seemingly do), it would have been impossible to insulate them from any sort of interactions with Member States actions and their legal systems. This supposition has already had its practical demonstration in the manner in which the Charter for Fundamental Rights is applied, despite being addressed only to 'the institutions, bodies, offices, and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'.³⁵⁶ If the Member States acting on the international arena have chosen a specific manner of international standard formulation, is the EU legitimised to go beyond? These considerations have an impact on the discussion of generality and non-arbitrariness of human rights norms to be implemented by the European Union. Let us assume that the international human rights norms as developed in a particular legal form (international agreements, guidelines etc.) by international organisation associating the majority of states form our general non-arbitrary benchmark. Would implementation of such norms (without affecting their content) in a more advanced legal form affect the perception of generality and non-arbitrariness? It seems that any alteration of those internationally agreed standards poses questions as to the fulfilment of those standards: Why this and not other legal form? What impact would this have on the content and end recipients and beneficiaries of these norms? From the perspective of the generality and non-arbitrariness of the unilateral measures falling within this category, it seems clear that the maintenance of international legal form of a given instrument is a safer solution. And since the Union follows the form set by the UN and other international organisations setting the standards, both generality and non-arbitrariness is attributable to the unilateral instruments addressed internally.

³⁵⁵ Even though it does not want to take this path. See: De Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' Rosas, 'Is the EU a Human Rights Organisation?' and others.

³⁵⁶ See case law of the CJ EU: *CJEU, Case C-400/10 PPU - McB*, *CJEU, Case C-617/10 - Åkerberg Fransson* *CJEU, Case C-399/11 Melloni*, and more recently: *CJEU, C-390/12, Pfleger et. al* [2014] ECR I-0000 nyr.

Similarly, **prospectivity** seems to be an easy criterion for evaluation, yet here also at least one doubt as to its fulfilment emerges. Most of the preparatory documents are adopted as a follow up to various EU strategies and subsequently reviewed. Yet, frequently, the EU does not manage to perform all of the foreseen activities and as a result they are adopted towards the end of a foreseen period. This is the case, for instance, with the democracy reports within all of the pilot countries.³⁵⁷ Whilst the prospective aspect is obviously not lost, the subsequent review cannot be fully performed not permitting to assess fully the prospectivity of those instruments.

As for the **clarity** of the norms included in such instruments, there are at least two aspects to be taken into consideration. Firstly, since they serve the implementation of international norms, substantively they should follow those norms thus transmitting the image of EU not only implementing international measures, but also fitting coherently in the international system of human rights protection. The norms may be assumed clear as they are a reiteration of existing instruments that, as it can be claimed, have been given clarity within the context where they have been adopted. Within the unilateral instruments at stake, we will find those implementing Human Rights Based Approach to Development (objective 10), international humanitarian law standards (objective 12), promoting ratification and implementation of Rome statute (objective 27). At other instances, the EU implements concrete international legal acts, such as the UN Convention on the Rights of Persons with Disabilities (objective 30), UN Guiding Principles on Business and Human Rights (objective 25), or the UNSC Resolutions 1325 and 1820 on Women, Peace, and Security (objective 12).³⁵⁸ In other words, the norms are clear inasmuch as the international norms are clear. This leads us to a second consideration: What if those norms are by no means clear? This may be the case if we consider the 'pure' human rights norms such as those enshrined in the

³⁵⁷ According to objective 6 of the EU HRs Action Plan, democracy reports with reference to the first generation pilot countries were to be finalized by the end of 2012, the earliest 2013. To date, they have been included solely in the reports of delegations with no Action Plans to follow up on them. Given that the development work of the EU comes in line with that of the UN, the revision of the development goals (with the focus on democracy and human rights as elements of good governance, see: European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 'Increasing the impact of EU Development Policy: an Agenda for Change' COM(2011) 637 final' (2011) <http://ec.europa.eu/europeaid/what/development-policies/documents/agenda_for_change_en.pdf> .

³⁵⁸ Objectives are quoted after: EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

European Convention for Human Rights. There, the Strasbourg Court fills those rights (their limitations and procedural conditions) with meaning that further determines their application in national legal systems. Could this be a case with the unilateral instruments of the EU at stake? The unilateral instruments that are internally addressed take the international human rights norms and translate them into the executive, internally applicable provisions. The executive nature of such provisions specifically requires that they are in a 'ready to use' form – not only easily applicable by institutions, but also permitting to perform assessment of those institutions' actions. Again, let us recall the sample of documents quoted above.

Human Rights Based Approach to Development (HRBAD) as the UN generated manner of incorporating human rights into the development practice has always been mostly an internal initiative of the UN agencies. Notably, the reason why the HRBAD has been developed was the legitimacy crisis on the part of those very agencies. They needed to develop internally a number of instruments to, firstly, guide their action, and, secondly, assess them in the light of fulfilled human rights obligations. As the result, a number of agency-specific operational instruments have been developed rendering the HRBAD very blurred. It is within such context that the EU needs to elaborate its own take on the HRBAD. The process is ongoing, hence it remains to be seen whether the EU is capable of enhancing the clarity of the picture.

In terms of implementation of concrete international legal acts, the situation seems to be even less complicated. Let us take the example of the UN Convention on the Rights of Persons with Disabilities (Objective 30) which in the external relations context is particularly valid in the development cooperation. There, the EU Commission has adopted two working documents: the 2012 Guidance Note for EU Staff: Disability Inclusive Development Cooperation³⁵⁹, and the September 2013, a Sixth Disability High Level Group Report on the Implementation of the UN Convention on the Rights of Persons with Disabilities. The latter is to serve the alteration of development programmes in the framework of the European Disability Strategy 2010-2020.

³⁵⁹ European Commission (DEVCO: D3 "Social and Human Development & Migration"): Guidance Note for EU Staff: Disability Inclusive Development Cooperation (2012).

To sum up, the clarity of norms in the unilateral instruments at stake depends largely on the same quality to be attributed to the international instruments from which the EU ones originate. Yet again, the above reasoning applies pertaining to whether the EU could implement those instruments in a better, clearer manner. Yet again, the answer would be similar – it could have, yet, such step would have serious implications for its internal legal order. On the other hand, as we could see on the example of the UN Convention on the Rights of Persons with Disabilities, wherever the EU could have shaped the content of the norms at the international level, it would have certainly done so. Hence, it cannot be stated that the EU fulfils in a complete manner the clarity requirement with reference to the internally addressed unilateral instruments. To give it justice, however, the reasons why this is the case are convincing if we consider the legal systems context and their interactions.

Finally, possibly the biggest problem posed by the preparatory acts and guidelines is that of **transparency of adoption procedures**. Volume 19 of the European Law Journal dealt with the extent to which constitutional principles of transparency, democratic participation and openness applied to the preparatory acts. On the one hand, the procedural aspects are clear since all of the institutions have their rules of procedure, on the other, they are extremely difficult to follow given various stages of their creation and extensive involvement of civil society.

Let us analyse three examples of instruments at stake in order to better understand if and how transparency principle may apply to them and the extent to which it is visible. We shall focus on three instruments: sectoral guides for the effective implementation of the UN Guiding Principles on Business and Human Rights; European Commission Staff Working Document 'Trade and Worst forms of Child Labour' of 30 April 2013, and the EU Guidelines on the promotion and protection of freedom of religion and belief of 24 June 2013. These documents were selected in order to analyse three ways of arriving at the final outcome. In the first case the European Commission assigned (outsourced) compilation of a handbook to a think tank; in the second case it acted on its own accord. Finally, the Guidelines represent a document taken out from the Commission's realm, adopted by the Council of the European Union.

However, before dealing with those three processes, we need to recall the approach the EU has taken towards transparency in its decision making inasmuch as it concerns the drafting and elaboration of preparatory acts.

Transparency in the European Union institutions refers predominantly to three general issues: clarity of processes and participation in them through open consultations, thus connected access to institutions' documents and information about who participates in both formal and informal decision making processes. All of the three aspects of transparency have been widely debated with the view of reforming generally conceived access to documents and transparency since 2008.³⁶⁰ The most important one from our point of view – access to documents³⁶¹ is still being decided with the European Parliament awaiting the decision of the Council's first reading position.³⁶² Hence, the current access to documents is granted on the basis of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents³⁶³. According to the regulation a third party can request access to the EU document understood as 'any content whatever its medium (written on paper or stored in electronic form or as a sound, visual or audiovisual recording) concerning a matter relating to the policies, activities and decisions falling within the institution's sphere of responsibility.'³⁶⁴ Hence, all of the reproducible output of the EU institutions should be accessible for the EU citizens. The problem identifiable easily with reference to preparatory

³⁶⁰ In fact the debate on transparency of the EU reaches back to the adoption of the Treaty of Maastricht, yet the current form of transparency as the one requiring reform dates back to 2001. T

³⁶¹ European Commission, 'Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM (2011) 137 final' <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0137:FIN:EN:PDF>> . The proposal is currently with the European Parliament (Committee on Civil Liberties, Justice and Home Affairs) : [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/0073\(COD\)&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=2011/0073(COD)&l=en) and the Council Working Party on Information: http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%2014549%202011%20INIT. The list of suggested amendments together with institutions' responses can be found on the InfoAccess website: <http://www.access-info.org/en/european-union/139-proposed-amendments-to-eu-access-to-docs-regulation>. The reform process of the Regulation has been severely criticized for its lack of transparency, see: Access Info, 'Report: The Secret State of EU Transparency Reforms of 21 March 2011' <http://www.access-info.org/documents/Access_Docs/Advancing/EU/Secret_State_of_EU_Transparency.pdf>

³⁶² Parliament's dossier on Public Access to Documents of the Commission, Parliament and the Council: <http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?id=563203>.

³⁶³ Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ (2001) L 145/43.

³⁶⁴ Article 3, *ibid*, at 44.

acts we are discussing here is fairly simple – we do not know how many of these documents are drafted, as internal procedures of institutions (apart from rules of procedure and codes of conduct) are nowhere to be found. In addition, especially the staff documents and guidance notes are to be produced by the Commission and/or the High Representative in a very ad-hoc manner; it is not clear if, when, and where consultations take place and how exactly is the process structured. Let us see on the example of the three selected instruments the extent to which transparency is visible in the stage of creation of EU unilateral human rights instruments directed at its own institutions and other EU bodies.

1. Sectoral Guides on Human Rights and Business

The three sectoral guides were elaborated in implementation of the UN Guiding Principles on Business and Human Rights. Their creation was deemed as one of the priority actions of the Communication on Corporate Social Responsibility.³⁶⁵ In December 2011 the European Commission selected two think tanks - the Institute for Human Rights and Business and Shift – to conduct the drafting and consultation process for the three Guides. The process of drafting the guides was maintained transparent and open by the selected research institutes. It was to commence with the selection of sectors which ensued in February 2012 following the setting up of the objective criteria on the basis of contributions from various stakeholders.³⁶⁶ The research phase of drafting of the Guides consisted of confidential interviews with stakeholders and desk-research followed by preliminary release of the first draft for the public comment in December 2012. In the meantime, two roundtables with participation of stakeholders and the Commission took place. The consultation³⁶⁷ phase came to an end in January 2013, and the three Guidance documents were submitted to the European Commission in April 2013 for publication.³⁶⁸

The case of the three guides proves that even if the process of drafting is outsourced from the Commission, a think tank commissioned with the task is obliged to act in an open and

³⁶⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of Regions, 'A renewed EU strategy 2011-14 for Corporate Social Responsibility', 25 October 2011, COM(2011) 681 final .

³⁶⁶ For invitation to submit considerations, see:

http://www.ihrb.org/pdf/Criteria_for_Selecting_Business_Sectors_and_Invitation_to_Provide_Recommendations.pdf.

³⁶⁷ For consultation documents, visit: <http://www.ihrb.org/project/eu-sector-guidance/consultation-documents-and-reports.html>.

³⁶⁸ For more detailed timeline of the project, see: <http://www.ihrb.org/project/eu-sector-guidance/index.html>.

transparent manner. Steps taken are, therefore, documented with result of each of them published and accessible to public. At the same time, however, the manner in which consultations and drafting are conducted is not proceduralised; though it takes place according to the usual project management format.

2. European Commission Staff Working Document 'Trade and Worst forms of Child Labour' of 30 April 2013³⁶⁹

European Commission Staff Working Document 'Trade and Worst forms of Child Labour' was prepared 'at the invitation' of the Council expressed in Council's Conclusions on Child Labour adopted on 14 June 2010.³⁷⁰ The process of drafting of the document, unlike its origins, is much less transparent.

The website of DG Trade recalls the document only with reference to the expert seminar (3 October 2012) and a meeting with civil society (10 October 2012). The former meeting took place with participation of experts of international organisations and academia (*inter alia*: 'Understanding Children's Work' (WB, ILO, UNICEF), University of Florence, Department of Labor, US, IPEC, UNICEF, OECD)³⁷¹. The latter meeting involved organisations of stakeholders.³⁷² Otherwise, the repositories of the documents (and therefore the only openly accessible source of information on the EU legislative and non-legislative process) refer either only to the final version of the Working Document³⁷³, or they refer to it within its own structures of decision making, as in the case of the European Parliament which received the document on 23 May 2013.³⁷⁴ Clearly adoption of an informal Working Staff document by the European Commission had to take place on an informal basis, however, it would be interesting to know who adopts these types of documents. If such document was to be

³⁶⁹ Commission Staff Working Document, Trade and Worst Forms of Child Labour, Brussels, 30 April 2013, SWD(2013) 173 final .

³⁷⁰ Conclusions on Child Labour of 14 June 2010, 10937/1/10, COHOM 156, PESC 780, DEVGEN 201, WTO 218, FREMP 29

³⁷¹ Details of this meeting are reported in Annex 1 to the Working Document: Commission Staff Working Document, Trade and Worst Forms of Child Labour, Brussels, 30 April 2013, SWD(2013) 173 final at 28-31.

³⁷² DG Trade European Commission, 'Meeting on the Staff Working Document on the Worst Forms of Child Labour and Trade of 10 October 2012' <http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150023.pdf> . See, also the overview of DG Trade Meetings: <http://trade.ec.europa.eu/civilsoc/meetdetails.cfm?meet=11395>.

³⁷³ Just like the European Commission: <http://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=list&n=10&adv=0&coteld=10102&year=2013&number=0173+&version=ALL&dateFrom=&dateTo=&serviceId=&documentType=&title=&titleLanguage=&titleSearch=ALL&sortBy=NUMBER&sortOrder=DESC>.

³⁷⁴ [http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=SWD\(2013\)0173&l=en](http://www.europarl.europa.eu/oeil/popups/ficheprocedure.do?reference=SWD(2013)0173&l=en)

adopted by the Commissioners, then should the voting be needed, the majority would need to be established on the basis of the rules of the Treaty and the principle of collegial responsibility could have been applied.³⁷⁵ Article 8 of Commission's Rule of Procedure stipulate in addition that "majority shall be required irrespective of the tenor and the nature of the decision".³⁷⁶ Yet, the Minutes of Commission's agenda³⁷⁷ do not report on the Staff Document – it simply wasn't discussed that day which means that it must have been adopted within DG Trade – with applicable rules unknown.

Clearly, the process of adopting the Staff Working Document is not very transparent. Whilst one can understand the internal nature of both deliberation, approval and application of this instrument, it would be useful to understand how this types of documents come about.

3. The EU Guidelines on the promotion and protection of freedom of religion and belief of 24 June 2013³⁷⁸

The last of examples at stake involves one of the sets of EU guidelines adopted in 2013; interesting inasmuch as the process of their adoption goes back to 2009.³⁷⁹ They have been revised by the European External Action Service, yet no documents from the drafting process are openly available.³⁸⁰ Whilst there is no information about the consultation process³⁸¹, several contributions of various religious organisations or association of organisations can be found.³⁸²

³⁷⁵ See, in relation to preparatory acts: *CJEU, Case C-137/92 Commission v BASF and Others* [1994] ECR I-2555, paragraph 62: 'According to settled case-law, the principle of collegiality is based on the equal participation of the Commissioners in the adoption of decisions, from which it follows in particular that decisions should be the subject of collective deliberation and that all the members of the college of Commissioners should bear collective responsibility at political level for all decisions adopted (*Case 5/85 AKZO Chemie v Commission* [1986] ECR 2585, paragraph 30; *Joined Cases 46/87 and 227/88 Hoechst v Commission* [1986] ECR 2859, and *Case 137/92 P Commission v BASF and Others*, cited above, paragraph 63)'.
³⁷⁶ European Commission, Rules of Procedure, OJ 2000 L 308/26, as subsequently amended.

³⁷⁷ <http://ec.europa.eu/transparency/regdoc/rep/10060/2013/EN/10060-2013-2044-EN-F1-1.Pdf>.

³⁷⁸ Union, 'EU Guidelines on the promotion and protection of freedom of religion or belief of 24 June 2013'.

³⁷⁹ Draft Council Conclusions on Freedom of Religion or Belief of 11 November 2009, 15510/09, COHOM 250, PESC 1488, COPOL 72.

³⁸⁰ Though they can be requested according to the rules in force. See: Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ(2001) L 145/43-48 *ibid* and Decision of 19 July 2011 on the rules regarding access to documents, OJ(2011) C 243/16.

³⁸¹ See: http://www.eeas.europa.eu/consultations/index_en.htm.

³⁸² See, for instance: Input to the drafting process of EU guidelines on the Freedom of Religion or Belief.

Once the draft had left the European External Action Service, its path is much easier to follow.³⁸³ The European Parliament, following the initiative of the Laima Liucija Andrikiene under the Rule 121 of Rules of Procedure of the European Parliament³⁸⁴ deliberated on the issue drawing on the report of the Foreign Affairs Committee³⁸⁵. Finally, the Parliament adopted a Recommendation to the Council on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI))³⁸⁶.

Clearly, the Recommendation to the Council played a role in subsequent deliberations – it is hard to determine the extent to which the action on the part of the European Parliament was taken into account by the Council for the unavailability of various versions of draft Guidelines.³⁸⁷ Nevertheless, the final draft was adopted on 24 June 2013 which makes the process relatively short even if it's initiation was to be counted back to the adoption of the Strategic Framework and Action Plan on Human Rights and Democracy on 25 June 2012.

The three selected processes of adoption of preparatory acts paint a very diverse picture of transparency in the area of unilateral instruments directed at the EU, its institutions, bodies and Member States. Whilst it is true that they are directed at the institutions acting in external field, the processes of adoption vary and cannot be followed in a transparent manner. It is possible to request access to documents both from the High Representative as well as the Council, yet the process is extremely time consuming. Furthermore, in case of present documents, the mere need to request access to documents would not have existed, had the procedures been clear and accessible. Otherwise, the path that needs to be taken

³⁸³ The complete procedure file is available at: [http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?reference=2013/2082\(INI\)&l=en#documentGateway](http://www.europarl.europa.eu/oel/popups/ficheprocedure.do?reference=2013/2082(INI)&l=en#documentGateway).

³⁸⁴ The Rule of Procedure 121 of the European Parliament refers to a proposal for a recommendation to the Council tabled by a group of 40 MEPs 'on subjects under Title V of the Treaty on European Union, or in cases where Parliament has not been consulted on an international agreement falling within the scope of Rules 90 or 91'. The recommendation follows a report prepared under the auspices of a relevant Committee. See: European Parliament, Rules of Procedure, 7th parliamentary term, January 2014.

³⁸⁵ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONGML+COMPARL+PE-510.559+01+DOC+PDF+V0//EN&language=EN>.

³⁸⁶ European Parliament recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI)).

³⁸⁷ See: Council's lists of documents: before the final version, there was one of 31 May 2013 (from the COHOM to the Political and Security Committee, ST 10336 2013 INIT), of 12 June 2013 (again from the COHOM to the Political and Security Committee, ST 10336 2013 REV 1) and two of 14 June 2013 (from General Secretariat Council to Permanent Representatives Committee, ST 10963 2013 INIT and ST 10891 2013 INIT): http://register.consilium.europa.eu/content/out?lang=EN&typ=ENTRY&i=SMPL&DOC_ID=ST%2010891%202013%20INIT.

during document creation is simply out of reach. Clearly, the leeway in political debate is important, yet if we consider that such debate takes place within the realm of human rights – and therefore apparently common traditions of the EU Member States - any sort of secrecy seems to be abundant.

III. Rule of Law Principles Concerning Instrument Application: Transparency and Equality

Assessing rule of law principles concerning instrument application is a harder task than understanding whether the unilateral internally directed instruments of EU external human rights are construed in line with rule of law criteria. The difficulty of this task lies in the fact that we need to define what in this context instrument application means. Normally, this (and the possibility of judicial intervention) would be dependent on a legal form of such instruments and the legal effects they may cause. A few thoughts on this matter shall be presented before focusing on the particular instruments.

Whilst it is a conventional view that the instruments at stake are of preparatory nature, their actual classification defies the usual categories to which the instruments belong. Of help to focus the discussion on actual systematic instances of instrument application will be to exclude from the discussion instruments addressed at the general public. Framed as guidelines elaborated together with and addressed at the representatives of businesses, in terms of their content they could be conceived of as recommendations. As such they are to be applied on voluntary basis and have scarce legal value. In fact, it would be very difficult to determine which legal effects would such instruments produce vis-à-vis third parties. They are not there to be orthodoxically observed, they are offered to the members of the business as a proposal. From this point of view, they should be considered as non-legal instruments. And as such they are not and cannot be regarded as instruments whose application can be assessed.³⁸⁸

The remaining instruments present a different case study: the two organisational groups include joint proposals from the High Representative, notes to the Delegations and Commission Staff working documents. These instruments contain either operational guidance on their behaviour, or build the knowledge necessary to execute EU obligations. Their application therefore consists in either taking into consideration of the findings brought about by those instruments in the decision making by the Commission or in the actual use of those instruments in the practice of the Commission, EEAS, and the EU Delegations in the field.

³⁸⁸ Unlike guidelines' effectiveness – issue that should be addressed beyond the framework of this study.

In terms of the form, the instruments within this group do not belong to any of the categories listed in Article 288 TFEU: they are not considered as legal acts. Nevertheless, they provide guidance to the institutions and these institutions are supposed to apply them. Their form is decisive inasmuch as even tracing their impact is concerned.

1. Transparency and Equality in instrument application

The principles of transparency and equality in case of application of the instruments at stake should be considered collectively as the latter is dependent on the former. Basically without transparency we cannot assess equality.

The imminent problem appears with reference to these instruments as far as their application is concerned. Most of them, referred to as guidelines or guidance notes for the staff, indicate content to be taken into consideration when making other decisions. Hence, in order to trace their application, we need to understand whether the institutions at stake recall the guidelines in their internal documents, or, other publications.

Yet again three instruments shall be selected in order to paint the broadest possible picture and illustrate best problems of their application. The first of the instruments are the guidelines. We shall deal with the oldest guidelines evoked in the Action Plan - the 2001 EU Guidelines on Torture, as updated on 20 March 2012 and the study for the European Parliament published in 2007 and updated in 2009, and the 2008 EU Guidelines on Human Rights Defenders³⁸⁹ whose evaluation was published in 2013³⁹⁰. The fact that they were adopted will make it much easier to trace their presence in the practice of the EU institutions. The second instrument: the Guidance Note for EU Staff: Disability Inclusive Development Cooperation of 2012³⁹¹ is a sample of Commission internal document directed at EURAID whilst the third document – ‘Joint Working Document on Advancing the Principle

³⁸⁹ Council of the European Union, Ensuring Protection - European Union Guidelines on Human Rights Defenders.

³⁹⁰ Karen Bennett, *Study for the European Parliament, Directorate-General for External Policies 'Assessing the Implementation of the European Union Guidelines on Human Rights Defenders - the Cases of Kyrgyzstan, Thailand, and Tunisia* (2013).

³⁹¹ European Commission (DEVCO: D3 "Social and Human Development & Migration"): Guidance Note for EU Staff: Disability Inclusive Development Cooperation (2012)

of Complementarity' of 31 January 2012³⁹² provides an example of an inter-institutional collaboration directed at the staff of both the EEAS and the European Commission.

The implementation and the use of the 2001 EU Guidelines on Torture has been subject of the study commissioned by the European Parliament whose results were published in 2007.³⁹³ According to the note summarising the study:

'It appears clear from the material collected, that most ECDs and EU Missions have neither entrusted a specific person with the task of ensuring the implementation of the guidelines *per se*, nor set any priorities on the basis of them. (...) Furthermore, most Missions do not appear to have received any specific instructions on how to use the guidelines. As pointed out by one representative in this respect, no instructions had been issued to the effect that their work should specifically or uniquely be based on the guidelines.'³⁹⁴

It seems, therefore, that the Guidelines inasmuch as they were to specifically guide institutions were present, yet not much has been done in order to indicate the specific use for them in this particular context. This was altered once the review of the guidelines in 2008 took place and introduced a number of operational indications – including monitoring and evaluation reporting for Heads of Missions. In line with the operational guidelines their content was to be implemented through: political dialogue, following on individual cases, including issuance of demarches, financial and technical assistance to stakeholders in third countries, cooperation with the Member States, inducing the creation of rehabilitation centres. Yet, all of the above initiatives are very much dependent on the awareness of the Heads of Missions and their team that has been apparently and in line with the report update seriously raised thanks to the efforts by the EU (in particular training) and the Member States. Furthermore, the accessibility of information on particular activities is very scarce – experts drafting studies for the European Parliament have relied chiefly on interviews with staff of the EU delegation (and that in selected countries only).

The more recent 2008 Guidelines on Human Rights Defenders have been tremendously successful, providing a boost to the EU efforts towards popularising the knowledge about the EU human rights defenders oriented initiatives and ultimately urging also Member States

³⁹² For example, see: Joint Staff Working Document on Advancing of the Principle of Complementarity: Toolkit for Bridging the Gap Between International&National Justice.

³⁹³ European Union: European Parliament, *The implementation of the EU guidelines on torture and other cruel, inhuman or degrading treatment or punishment*, March 2007, available at: <http://www.refworld.org/docid/4705e5332.html> [accessed 18 January 2014].

³⁹⁴ *Ibid*, at 30.

to contribute to the provision of temporary shelters for them (objective 18). Yet, even there a number of doubts arise. Whilst the implementation was to be overseen by the COHOM³⁹⁵, it is to be conducted ultimately by the EU Delegations. In general, since 2010 the main tool to be used by the EU delegations was supposed to be the Human Rights Country Strategies, which are in great part, however, unavailable. The delegates explain the secrecy of the strategies with the need to protect their own priorities but also particular human rights defenders. Nevertheless, at the moment apparently efforts are made in order to include the findings of the country strategies into the EU annual human rights reports.³⁹⁶

In practice, it works in the following manner:

‘Within the EEAS structure, responsibility for the Guidelines policy sits within the Human Rights and Democracy Unit and human rights policies are acted on across EEAS geographic desks. The geographic desks are involved in human rights defender activities as part of their work with their field colleagues in a given country, for example, in relation to individual cases raised during human rights dialogues, or a communication regarding a démarche undertaken locally on behalf of an HRD. The EEAS human rights policy desk and geographic desks have cross cutting activities and direct engagement with field missions, such as liaising with colleague on visa applications for HRDs or on pending EU programmes for HRDs at risks. Programme support and grant making for HRDs and civil society is available through the European Instrument for Human Rights and Democracy (EIDHR) managed through the Directorate General for Development Cooperation - EuropeAid (DEVCO)² and the EEAS.’³⁹⁷

Yet again, the success of the Guidelines on Human Rights Defenders (and other guidelines for that matter) depends on the awareness of delegations’ staff. For that reason

‘(t)he EEAS provides human rights trainings for EUD diplomats twice a year to work toward the aim of mainstreaming human rights into external actions. Trainings are mandatory for HoMs, HoDs, and human rights focal points of EUDs. The Guidelines were described as mentioned in EEAS human rights trainings, but there are no ‘Guidelines focused’ trainings offered. The EEAS provides funding to the NGO Frontline to carry out two trainings per year on the implementation of the Guidelines in third countries, which involve HRDs, EUD and MSM staff. These trainings are designed to support the interface between HRDs and EU diplomats to improve effective implementation of the Guidelines.’³⁹⁸

The picture that emerges from this very brief overview of Guidelines implementation and application is a rather chaotic one. Whilst Guidelines with time tend to be more specific as to

³⁹⁵ Council of the European Union, Ensuring Protection - European Union Guidelines on Human Rights Defenders, op. cit.

³⁹⁶ Bennett, at 29-30.

³⁹⁷ Ibid, at 27.

³⁹⁸ Ibid, at 27-28.

which actions need to be predominantly taken, initially they simply exist – their impact on policy enforcement is scarce. Only with time, following, the initial surprising (sic!) realisation that if not promoted, the mere existence of the guidelines is neglected by the staff, the institutions start exerting pressure on its personnel. Only then, with time do guidelines become an element of the day-to-day practice of the EU delegations staff following the extensive trainings that take place both at the headquarters and abroad.

The same is true for a second document we have selected as the exemplary: the Guidance Note for EU Staff: Disability Inclusive Development Cooperation of 2012³⁹⁹ being a sample of Commission internal document directed at EURAID has not seen much of its practical application. The December 2013 European Parliament's Briefing Paper on the Implementation of the UN Convention on Rights of Persons with Disabilities⁴⁰⁰ points solely to the trainings organised for both the Brussels-based staff and staff in delegations.⁴⁰¹ Obviously, given the focus on mainstreaming of disability concerns as the means of implementing of the UN Convention on Rights of Persons with Disabilities, the guidance note is just one of many initiatives that will take form in the coming months, yet as for now, its application seems to be of limited scope.

Finally, concerning the last of the sample documents – the one to be applied in cooperation between the EEAS and the European Commission: the 'Joint Working Document on Advancing the Principle of Complementarity' in relation to complementarity between the ICC and the national criminal systems of 31 January 2012⁴⁰², one cannot draw almost any conclusions on its application. To be more precise, there exists no data on its application in practice. This fact induced the Human Rights Watch to address the letter to the High Representative and the Commissioner for Development indicating the weakness of the

³⁹⁹ European Commission (DEVCO: D3 "Social and Human Development & Migration"): Guidance Note for EU Staff: Disability Inclusive Development Cooperation (2012), op. cit.

⁴⁰⁰ Janina Arsenjeva, *Briefing Paper: Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU's External Relations* (2013), at 13-14. See also: Jennifer W. Reiss, 'Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities' 20 *European Law Journal* 107.

⁴⁰¹ The report recalls the course of 29-30 November 2012: <http://goo.gl/yNSRb>.

⁴⁰² Joint Staff Working Document on Advancing of the Principle of Complementarity: Toolkit for Bridging the Gap Between International&National Justice.

Toolkit (lack of operational annex, or monitoring) and the ways through which these weaknesses could be addressed.⁴⁰³

The purpose of the Document is to **‘provide guidance to the staff of the EU institutions, relevant ministries of EU Member States, and EU Delegations as well as embassies of EU Member States around the world**, which they can also use in contacts with third countries at all levels.’ (emphasis as in the original document).⁴⁰⁴ In case of this particular document, content is of importance. Namely, the document is more of the knowledge building piece offering a state of play overview for the area of criminal justice, measures and obligations which can be referred to. It provides a series of logical questions to be considered by addressees – yet similarly to the Sector Guides implementing the UN Principles on Business and Human Rights the application of the Complementarity Toolkit is voluntary. In such form, its application cannot be monitored.

The provided examples allow for a conclusion that application of the instruments falling within the category of the unilateral ones, adopted for internal purposes is not monitored in a sufficient manner for it to be assessed. The mere presence of the documents is supposed to be a proof of the EU’s compliance with the set standards; or commitment to their promotion. Obviously, many of the instruments were adopted recently hence possibly there is not enough data to draw from in order to assess their application. Similarly as on the international level, once created, the guidelines can be referred to as standards. The voluntariness of such reference brings back the question of their legal form; yet importantly the standards bind above all their own institution. If we analyse the extent to which the institution is bound, then we can see the commitment to training of its own staff and, at the same time, at least rhetorical iteration of various instruments – forming a narrative repeated on the occasion of every staff document, every report, and official publication. The actual application would need to be assessed on actual initiatives and priorities of heads of missions – we should get more information on the matter when assessing the application of the EU financial instruments in Chapter 5.

⁴⁰³ Human Rights Watch: Letter on Recommendations concerning the EU Complementarity Toolkit.

⁴⁰⁴ Joint Staff Working Document on Advancing of the Principle of Complementarity: Toolkit for Bridging the Gap Between International&National Justice, op. cit.

The unfortunate conclusion of the analysis of rule of law principles concerning instrument application is the inability to evaluate the fulfilment on equality principle – a direct consequence of inability to trace transparent actions on the part of the Commission and the EEAS. What remains is the belief based on the findings of the European Parliament's reports that the documents at stake find their way into the everyday practice of the EU staff, and that the implications of documents' content will have a horizontal effect across policies and institutions.

IV. Role of the Court: Availability of Judicial Review and Rule of Law Principles Concerning Conflict Resolution

Given that the instruments we are dealing with in this section are of operational value their implications can be solely visible if a concrete legal action undertaken by the EU staff is evaluated through the lens of standards set by the instruments at stake here. We could consider them as being a form of the preparatory acts of the institutions - yet even in this case their position amongst reviewable legal acts is more than doubtful. The CJEU pronounced that preparatory nature implying prospectivity of a measure that is to be adopted in the future does not allow for reliance on such in the court proceedings.⁴⁰⁵ If we were, therefore, analogously to apply case law on preparatory acts to the acts at stake in a present analysis, we would be forced to give an outwardly negative answer as to their reviewability by the Court.

So far, in the case law of the EUCJ there has been no mention of any of the above outlined instruments neither in the context of judicial review, nor in the context of conflicts they could have given rise to. Hence, it is possible to consider how and in which manner could the Court approach such instruments when exercising its control function.

⁴⁰⁵ EU CJ, Case C-60/81, *IBM vs Commission*, 11 November 1981 [1981] ECR 2639, at para 12. See, also: General Court, Case T-184/04, *Sulvida – Companhia de alienação de terrenos, Lda vs the European Commission*, 13 January 2005, at para 14: 'Moreover, a mere proposal for a directive, such as the applicant is demanding from the Commission, on cross-border transfers of seats of companies with share capital and of partnerships would not be an act producing binding legal effects *vis-à-vis* third parties, but a purely intermediate preparatory measure. Such a measure is not a measure which may be the subject of an action for annulment under Article 230 EC, and the failure to adopt such a measure may likewise not be challenged by an action for failure to act under Article 232 EC (Case 90/78 *Granaria v Council and Commission* [1979] ECR 1081, paragraph 12 et seq.; orders in Case T-167/95 *Kuchlenz-Winter v Council* [1996] ECR II-1607, paragraph 20 et seq.; Case T-175/96 *Berthu v Commission* [1997] ECR II-811, paragraph 18 et seq.; and of 1 December 1999 in Case T-198/99 *Buchbinder and Nöcker v Commission*, not published in the ECR, paragraph 11).'

The final rule of law principle relevant for the process of instrument creation is that of the availability of judicial review. In concrete terms, what we are interested in here is whether (if at all) the instruments at stake can be subject to review. Should this be the case, we shall secondly deal with grounds for review relevant from the point of view of instrument creation.

Clearly, when speaking of judicial review, we need to treat the review from the international law perspective. The review, furthermore, can be performed only within the perimeters determined by the Treaties. The European Union legal order offers the review of legality of measures that is to be performed by the Court of Justice of the European Union and the General Court. Article 263 TFEU⁴⁰⁶ clearly provides for the conditions under which the act can undergo a review. Should the action brought on the basis of Article 263 TFEU be well founded, the Court will declare the act void in a definite manner (Article 264 TFEU).

There are five conditions under which an act can be subject to judicial review: Firstly, the act must be issued by a body which is amenable to judicial review. Secondly, the act has to fall within the category of those open to challenge. Thirdly, the person or a body bringing the action must have a legal standing to do so and point to, fourthly, the grounds for illegality as provide for by Article 263(2). Finally, the challenge to the action has to be brought within the time limit as stipulated for in Article 263(6). Since we need to understand here whether acts

⁴⁰⁶ Article 263 TFEU: 'The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-a-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-a-vis third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers.

The Court shall have jurisdiction under the same conditions in actions brought by the Court of Auditors, by the European Central Bank and by the Committee of the Regions for the purpose of protecting their prerogatives.

Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

Acts setting up bodies, offices and agencies of the Union may lay down specific conditions and arrangements concerning actions brought by natural or legal persons against acts of these bodies, offices or agencies intended to produce legal effects in relation to them.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

at stake would be subject to judicial review, let us consider the bodies amenable for the judicial review and the categories of acts that could be subject to it.

The bodies are enumerated in Article 263 TFEU and comprise the Commission and the Council – including legislative acts other than recommendations and opinions - and the European Central Bank. These are also the European Parliament, European Council and EU bodies, offices, or agencies but with reference to acts intended to produce legal effects vis-à-vis third parties. As far as the second group is concerned, they can lay their own conditions pertaining to actions brought by legal persons against acts of these bodies.

Ratione personae, in theory the conditions for the reviewability of the acts at stake, are fulfilled, however, *ratione materiae* this is not the case. Subject to review are the acts that are either of legislative nature (with exception of recommendations and opinions), or those that are intended to produce legal effects vis-à-vis third parties. Clearly, the unilateral measures addressed at the EU institutions do not fall within the first category, even if we expand it following the EU CJ case law and include other *sui generis* acts of either binding force or producing legal effects.⁴⁰⁷

According to the standing doctrine developed by the CJ EU in ERTA case, the action for annulment can be filed against ‘all measures adopted by the institutions whatever their nature of form, which are intended to have legal effects’⁴⁰⁸. It is, therefore, the content, not the form of the act⁴⁰⁹ that the Court is concerned with, yet with an important implication according to which applicant’s ‘legal position’ must be affected. What is, furthermore, important is that the act is of final, not preparatory character.

From the point of view of the instruments at stake in our discussion, the information about the form could bring some hope to such instruments’ assessment from rule of law perspective. Clearly, the written operational guidance and guidelines could be subject to

⁴⁰⁷ CJEU, Case C-57/95 *France v Commission* [1997] ECR I-1627, also: CJEU, Case C-370/07 *Commission v Council (CITES)* ECR I-8917.

⁴⁰⁸ Case C-22/70, *Commission v Council (ERTA)* [1971] ECR 263, at para. 42.

⁴⁰⁹ The Court has accepted as reviewable acts conclusions adopted by the Member States in the Council with reference to an international agreement (*ERTA* case, op. cit.), letters written by Commission’s staff (Case T-84/97, *BEUC v Commission*, [1998] ECR II-795, at para. 48, case T-113/00, *DuPont and others v Commission*, [2002] ECR II-3681, at para. 45), oral decisions (e. g. Joined Cases 316/82 and 40/83 *Kohler v Court of Auditors* [1984] ECR 641, at paras. 9-13; Case T-3/93 *Air France v Commission*, [1994], ECR II-121, at paras. 57-59; Case T-85/03R *Government of Cayman Islands v Commission*, order of 26 march 2003, at para. 60.).

judicial review by the Court. They are definitely of a final character and within their content contain clear indications as to the standard of behaviour of the EU bodies. The doubt appears, however, if we scrutinize the 'intended legal effect vis-à-vis third parties' condition. In our case – is there an intent of creating a legal effect? Who would the affected third parties be? Would they be given *locus standi* before the Court? Purely hypothetically, any legal or natural person for whom the act (of regulatory character) would be of direct and individual concern could instigate the proceedings before the Court. This may refer to any third person beneficiary of EU action in a third country within a development policy scheme, or an NGO dealing with one of the issues covered by the said instruments. In any case, it would require a very favourable interpretation of the 'direct and individual concern' and an extensive focus on gathering evidence with almost unbearable burden of proof. One could expect that the privileged or quasi-privileged applicants: a Member State, the European Parliament, the Council and the Commission would act as watchdogs on behalf of individuals affected. Yet, ultimately, it would take on one hand a skilled lawyer to make a successful case in the context at stake.

To this date, the EU CJ has not addressed this issues and there has not been a case requesting the review of one of the unilateral instruments addressed at the EU institutions. Possibly, the mere lack of such case indicates the conviction that such instruments are not subject to the review by the Court. Yet, given the previous case law, it would be safer to state that the question of judicial review on the basis of Article 263 TFEU remains an open one.

V. Rule of Law Assessment

The above performed analysis reveal a number of rule of law shortcomings that burden the unilateral instruments addressed at the EU institutions. At the instrument creation stage the criterion of transparency is not fully met, which is also the case at the instrument application stage, thus making the assessment of the equality principle impossible. Finally, the role of the court as outlined in the above section has proven very limited. It would be very hard to speak of the high standard of the rule of law observed by the Union with respect to the unilateral instruments adopted for internal purposes. Yet, many of the issues addressed in this chapter evolve around the legal form of the instruments at stake. They all belong to the category of soft measures; measures also directed very much internally. Their application is

(with a few exceptions) an internal matter of the institutions and their staff. Such observation provokes further questions as to the extent through which such internal matter is internally monitored and enforced. These issues, however, belong to the content matter, largely politically and organisationally determined by units within the Commission and the EEAS. Though one could argue that due attention paid to all the preparatory documents could in theory be a part of the professional conduct and subject to disciplinary proceedings according to the rules of assessment of the EU staff.

Somehow, we are facing here a paradoxical situation where the adoption of the guidelines specific for different areas of human rights policy is not accompanied by a strategically planned and implemented application. The preparatory documents analysed with this chapter tend to 'exist' in a rhetorical layer of EU's activity – they are not to produce effects from the point of view of the wider public. They are a manifestation of EU's engagement with the topic – not its elaboration or contribution to the topic. The actual use of the guidelines is to take place in the actual practice of EU staff and institutions – practice that by now needs to mainstream at least ten different (though not necessarily conflicting) objectives such as implementing gender based approaches, combating torture, promoting freedom of speech, or encouraging endorsement of the ICC's activities.⁴¹⁰ The principles of the rule of law possibly will matter at this later stage. Clearly, the fulfilment of the rule of law criteria is inaccessible given the current legal and organisational architecture of the EU. Are the EU institutions aware of it? Do they strive for amending the situation?

⁴¹⁰ The mainstreaming of various priorities in the form in which it exists at the moment seems to be largely counter-productive. Clearly not everything can be mainstreamed, otherwise the main current will be no different from the previous situation. It seems that the horizontal approach thus taken by the Union is, as for now, creating more confusion. At the same time, it provides for the solid basis for actual relationships with specific third countries. Yet, the monitoring of the pursuit of such objectives seems to be largely impossible. How can all of the mainstreamed (and non-mainstreamed) issues be addressed at the same time? Who will conduct the monitoring and impact assessment? What if conflicts between various interests and objectives appear?

Chapter 5 – Unilateral Measures adopted for External Purposes Directed at 3rd Countries and Members of the Civil Society

I. Setting the Scene

The second category of instruments have been classified for the purposes of our analysis as the unilateral measures adopted for external purposes the EU addresses at third countries or members of civil society (both individuals and organisations).

By means of a preliminary comment, it seems that the task of evaluation of the present instruments is a much easier one. The reasons for such assertion are rather straightforward: Above all, instruments at stake in the present chapter are binding in nature, adopted in the form of regulations, hence their creation and application are governed by all the normal rules applicable to any legislative (ordinary) Union acts. It may be even stated that since the majority of these instruments governs the allocation of funds, standards applicable to the availability of information on how these funds are spent are much more rigid raising thus transparency of instrument application (in particular). What is more, these instruments are directed at the wider public – specific groups of addressees identified in an objective manner in the content of these instruments. The bottom up approach in inducing the application of an instrument to a given addressee forces the EU to draft the rules in a very clear and transparent but cautious manner. For the same reason we could even venture the statement that the availability of information in relation to application of the present instruments is much higher than in case of international agreements that are the base of the analysis in the next chapter.⁴¹¹

The evaluation of this set of instruments is not deprived of its difficulties. Above all these instruments do not exist in a void - they are complementary to the international agreements permitting the EU either to enhance the obligations binding on it on the basis of such acts, or to enforce them, especially inasmuch as the development cooperation obligations are concerned. This means, that in the general scheme of the policy, the use of the majority of these instruments (with the exception of the GSP+ regulation and Council common position)

⁴¹¹ However, practice of the CJEU does not confirm this statement. See: *General Court, Case T-17/10 Steinberg v Commission* [2012] nyr.

are either instrumental for or conditional upon the existence and actual use of other instruments.

Let us present briefly the type of instruments we are dealing with before their analysis commences.

As in case of the previously examined category, the overview of these instruments is drafted on the basis of the 2012 EU Human Rights Strategy⁴¹². Table No 3 provides the exhaustive list of unilateral instruments of the EU directed at third states and the Members of the civil society that have been included in the Strategy. It needs to be noted, however, that it is not a totality of all the instruments used in the area. The Strategy simply did not take into consideration financial instruments used in the frameworks of the accession and neighbourhood policies. Their sophistication and the complex current political situation⁴¹³ explains why they have not been recently in the centre of attention and, therefore, not been included in the Strategy.

Table No 3 - Unilateral Measures adopted for External Purposes Directed at 3rd Countries and Members of Civil Society according to the 2012 Annual Human Rights Report (thematic)⁴¹⁴

STATE OF IMPLEMENTATION - 1 January 2014					
Objective	Instrument	Body Responsible	EU Document/Legal Act	Legal Act/Procedure	Addressee
2. Genuine Partnership with civil society, including at local level	European Instrument for Human Rights and Democracy	EU Delegations, European Commission	European Instrument for Human Rights and Democracy Implementation of "The roots of democracy and sustainable development: Europe's engagement with Civil Society in external relations (COM (2012) 492 final, 15 October 2012) Preparation of Roadmaps for engagement with CSOs in partner countries (to be completed by July 2014)	Article 288 TFEU and the following	civil society
11. Make trade work in a way that helps human rights	Review Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture to ensure improved implementation.	European Commission Council	25 October 2012 - new GSP regulation (Regulation No 978/2012) Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture to ensure improved implementation (amended in July 2013)	Article 288 TFEU and the following	partner countries
	Review of Council Common Position 2008/944/CFSP on Arms Exports takes account of human rights and International Humanitarian Law taking into account human rights	EEAS European Commission Member States	Council Common Position 2008/944/CFSP on Arms Exports - no information available on the revision	Council	partner countries
24. Freedom of expression online and offline	Include human rights violations as one of the reasons following which non-listed items may be subject to export restrictions by Member States.	Council Member States Commission	No data		
31. Impact on the ground through tailor-made approaches	Human rights country strategies in third countries and complete the ongoing first round (develop, assess, identify best practices)	EEAS Commission Member States	Up to 13 May 2013 ab 140 country strategies were adopted, subsequently the review process has been undertaken.	European Commission EEAS	partner countries, EU institutions
	Reporting and Reviewing of Strategies	EU Delegations, EU HoMs	Up to 13 May 2013 ab 140 country strategies were adopted, subsequently the review process has been undertaken.	European Commission EEAS	partner countries, EU institutions
	Systematise follow-up of the ENP progress reports	EEAS Commission	ENP Progress Report	European Commission EEAS	partner countries, EU institutions

⁴¹² EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12).

⁴¹³ The completion of Croatian accession process marks the end of the imminent accession policies. It is not likely that any of the accession countries (Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Iceland, Kosovo, Montenegro, Serbia, and Turkey) joins the EU within the next years.

⁴¹⁴ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports).

In fact there are only two types of instruments that are classified for the purposes of this study as unilateral measures directed at the 3rd countries and the members of civil society. These are regulations and common positions.

The Report, for the first time refers to the Common Foreign and Security Policy instrument - Council Common Position 2008/944/CFSP on Arms Exports. Unlike the financial instruments that belong to the realm of external relations - the external dimension of the former I pillar, the common position is of a completely different character and belongs to the traditionally conceived foreign policy framework. Even though the distinction between pillars has been abolished under the Treaty of Lisbon framework, the characteristics of specific instruments has been maintained. Hence, when scrutinising instruments: common positions under the rule of law lens, it is hardly possible that the conclusions are positive. That is true, in particular as some would refer to common positions as international law instruments - of coordinating rather than legislative nature. In addition, apart from restrictive measures targeting individuals, the CJEU cannot undertake the judicial control of such measures.⁴¹⁵ For these reasons, the CFSP common positions will be left out from the analysis in this Chapter - we will refer to them briefly in the final part of this study.

The Report⁴¹⁶, amongst legislative acts, names the European Instrument for Democracy and Human Rights (EIDHR)⁴¹⁷, the reformed GSP Regulation⁴¹⁸ and the update of the Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture⁴¹⁹. In order to provide the sample of instruments at stake we shall deal with the EIDHR and the GSP plus as the most interesting and most advanced pieces of legislation at stake.

⁴¹⁵ See: Article 275 TFEU: 'The Court of Justice of the European Union **shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions.**

However, the Court shall have jurisdiction to monitor compliance with Article 40 of the Treaty on European Union and to rule on proceedings, brought in accordance with the conditions laid down in the fourth paragraph of Article 263 of this Treaty, **reviewing the legality of decisions providing for restrictive measures against natural or legal persons** adopted by the Council on the basis of Chapter 2 of Title V of the Treaty on European Union.'

⁴¹⁶ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports).

⁴¹⁷ 'Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/01' <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:386:0001:0011:EN:PDF>> .

⁴¹⁸ Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC), OJ 2012 L 303/1a.

⁴¹⁹ 'Council Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ 2005 L 200/1' <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:200:0001:0019:EN:PDF>> .

The mentioned reports and strategies refer also to other financial instruments, hence it is pertinent that we recall all of them at this stage, especially that we are dealing with series of legal acts adopted recently - on 11 March 2014. The financial regulations have been consciously aligned with one another and one horizontal regulation was adopted providing for the rules of their implementation. The group comprises of the European Stability Instrument⁴²⁰, Pre-Accession Assistance Instrument⁴²¹, European Neighbourhood Policy Instrument⁴²², Development Cooperation Instrument⁴²³, Partnership Instrument⁴²⁴, European Instrument for Democracy and Human Rights⁴²⁵. Notably, the common rules for implementation of these instruments have been laid down in a separate Regulation for the implementation of the Union's instruments for financing external action⁴²⁶. The last of the cited legislative acts will provide us with the information on procedural aspects of implementation of these instruments, whilst the regulations contain general substantive provisions concerning the scope *ratione materiae* and *ratione personae* of their application.

The unilateral instruments directed externally - at third state, individuals and entities in these third states - are usually such that are used in administration of assistance offered by the European Union to third countries. These instruments are either a form of *lex specialis* to the international agreements that form the basis of cooperation and Union's dedication of funds for the development cooperation that is supposed to be undertaken under these agreements^{427, 428}, or they form the basis of providing assistance within the broader frameworks of cooperation, not necessarily governed by international agreements, as within

⁴²⁰ Regulation (EU) No 230/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument contributing to stability and peace, OJ 2014 L 77/1.

⁴²¹ Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-Accession Assistance (IPA II), OJ 2014 L 77/11.

⁴²² Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing an European Neighbourhood Instrument (ENPI), OJ 2014 L 77/27.

⁴²³ Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing an instrument for development cooperation for the period 2014-2020, OJ 2014 L 77/44.

⁴²⁴ Regulation (EU) No 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries, OJ 2014 L 77/77.

⁴²⁵ Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, OJ 2014 L 77/85.

⁴²⁶ Below I will refer to it as to the "Horizontal Implementing Regulation": Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ 2014 L 77/95.

⁴²⁷ Development Cooperation Instrument.

⁴²⁸ Partnership Instrument, op. cit.

enlargement process⁴²⁹ or neighbourhood policy⁴³⁰, or permit for granting financial assistance in objectively defined circumstances^{431, 432}. In the first case the EU provides assistance within the pre-established contractual frameworks, in the latter two, they require voluntariness on the part of addressees of these unilateral measures. It is up to those states to decide whether their wish is to reach out for financial assistance, terms and conditions obviously apply. All of the regulations are implemented on the basis of the mentioned implementation regulation and are structured in a similar manner: Following the Preamble which customarily addresses the principle governing the EU external action, and sets the objectives for each of the instruments. Interestingly, each of the instruments refers to the policy framework within which it operates. Each of them contains also relevant provisions on coherence in the assistance and imposes an obligation (!) on the Commission to ensure establishment of such coherence. Acting within the scope of the financial instruments, the Commission is also equipped with a power to adopt delegated acts in order to implement each of such instruments. Such acts are of interest for the purposes of our study - these are the above mentioned strategies and reports.

The general objectives and addressees of each of the instruments are represented in the table below.

⁴²⁹ IPA II, op. cit.

⁴³⁰ ENPI, op. cit.

⁴³¹ Stability Instrument, op. cit.

⁴³² EIDHR, op. cit.

Table 3: Objectives and Addressees of the EU Financial Instruments

		Article 1
Peace and Stability Instrument	Addressees	2. The Union shall undertake development cooperation measures, as well as financial, economic and technical cooperation measures, with third countries, regional and international organisations and other State and civil society actors under the conditions laid down in this Regulation.
	Objectives	4. The specific objectives of this Regulation shall be: (a) in a situation of crisis or emerging crisis , to contribute swiftly to stability by providing an effective response designed to help preserve, establish or re-establish the conditions essential to the proper implementation of the Union's external policies and actions in accordance with Article 21 TEU; (b) to contribute to the prevention of conflicts and to ensuring capacity and preparedness to address pre- and post-crisis situations and build peace ; and (c) to address specific global and trans-regional threats to peace, international security and stability.
IPA II	Addressees	Candidate states
	Objectives	(...) shall support the beneficiaries listed in Annex I (candidate states) in adopting and implementing the political, institutional, legal, administrative, social and economic reforms required by those beneficiaries in order to comply with the Union's values and to progressively align to the Union's rules, standards, policies and practices, with a view to Union membership.
ENPI	Addressees	Neighbourhood states
	Objectives	(...) a view to advancing further towards an area of shared prosperity and good neighbourliness involving the Union and the countries and territories listed in Annex I ('the partner countries') by developing a special relationship founded on cooperation, peace and security, mutual accountability and a shared commitment to the universal values of democracy, the rule of law and respect for human rights in accordance with the TEU. 2. Union support under this Regulation shall be used for the benefit of partner countries and the areas involved in crossborder cooperation . It can also be used for the common benefit of the Union and partner countries . 3. Union support under this Regulation may also be used for the purpose of enabling the Russian Federation to participate in cross-border cooperation, in regional cooperation with Union participation and in relevant multi-country programmes , including in cooperation on education, in particular student exchanges. 4. <u>The Union promotes, develops and consolidates the values of liberty, democracy, the universality and indivisibility of, and respect for, human rights and fundamental freedoms, and the principles of equality and the rule of law, on which it is founded, through dialogue and cooperation with third countries and</u>
EIDHR	Addressees	civil society organisations, human rights defenders, victims of repression and abuse Article 11(1) of the Horizontal Implementing Regulation: "participation in the award of procurement contracts or grants, as well as the recruitment of experts shall be open without limitations under the EIDHR and the Instrument Contributing to Stability and Peace. Article 11(2) of the Horizontal Implementing Regulation: 'Under the EIDHR the following bodies and actors shall be eligible for funding under Article 4(1), (2) and (3) and point (c) of Article 6(1): civil society organisations , including non-governmental non-profit organisations and independent political foundations, community-based organisations and private sector non-profit agencies, institutions and organisations and networks thereof at local, national, regional and international level; (b) public sector non-profit agencies, institutions and organisations and networks at local, national, regional and international level; (c) national, regional, and international parliamentary bodies , when this is necessary to achieve the objective of the EIDHR and the proposed measure cannot be financed under another Instrument; (d) international and regional inter-governmental organisations; (d) natural persons, entities without legal personality and , in exceptional and duly justified cases, other bodies or actors not identified in this paragraph, when this is necessary to achieve the objectives of the EIDHR.

	Objectives	(...) the Union shall provide assistance to the development and consolidation of democracy and the rule of law and of respect for all human rights and fundamental freedoms. Such assistance shall aim in particular at: (a) supporting, developing and consolidating democracy in third countries, by enhancing participatory and representative democracy, strengthening the overall democratic cycle, in particular by reinforcing an active role for civil society within this cycle, and the rule of law, and improving the reliability of electoral processes, in particular by means of EU EOMs; (b) enhancing respect for and observance of human rights and fundamental freedoms, as proclaimed in the UN Universal Declaration of Human Rights and other international and regional human rights instruments, and strengthening their protection, promotion, implementation and monitoring, mainly through support to relevant civil society organisations, human rights defenders and victims of repression and abuse.
Partnership Instrument	Addressees	States
	Objectives	The Partnership Instrument shall support measures that respond in an effective and flexible manner to objectives arising from the Union's bilateral, regional or multilateral relationships with third countries and shall address challenges of global concern and ensure an adequate follow-up to decisions taken at a multilateral level. It is applicable where other financial instruments cannot be used.
Development Cooperation Instrument	Addressees	states but with exceptions referred to in Article 1
	Objectives	(a) the primary objective of cooperation under this Regulation shall be the reduction and, in the long term, the eradication of poverty; (b) consistently with the primary objective referred to in point (a), cooperation under this Regulation shall contribute to: fostering sustainable economic, social and environmental development, and consolidating and supporting democracy, the rule of law, good governance, human rights and the relevant principles of international law

The particularities of each of the sets of objectives and groups of addressees has been taken into consideration in the horizontal regulation in Article 5, however, the general idea of how these instruments function, remains binding in all the five contexts. With this awareness we may focus on the analysis of the European Instrument for Democracy and Human Rights, rules concerning its adoption and implementation and the judicial control - especially that, only in its and the Peace and Stability Instrument's context the access to the assistance is open to the wider public.

The second of regulations that will be the focus of our analysis is the one establishing the Generalised System of Preferences.⁴³³ The GSP arrangement has been functioning since 2006, currently on the basis of the Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation. This unilateral arrangement of the European Union allows developing countries for nonreciprocal preferential access to the EU internal market. Yet, from the EU external human rights policy, the core of that regulation lies in the so-called GSP+ scheme – a special incentive arrangement for sustainable development and good

⁴³³ GSP Regulation, op. cit.

governance. The special incentive arrangement provides for suspension of value-added duties on specific products provided that a developing country is considered to be vulnerable, and 'has ratified and effectively implemented all the conventions listed in Annex III' and 'gives an undertaking to maintain the ratification of the conventions and their implementing legislation and measures and accepts regular monitoring and review of its implementation record in accordance with the implementation provisions of the conventions it has ratified'.⁴³⁴ The GSP regulation draws the attention to yet another characteristic feature of the EU unilateral instruments. The mentioned above voluntariness is complemented by the proceduralization of the implementation stage. This will also be given a due attention in the section III of this chapter devoted to the Rule of Law principles devoted to norms application.

Finally, the Report refers to reports and strategies that form a part of the picture, however, in their form they resemble the Chapter 4 category of instruments - Unilateral Measures Adopted for Internal Purposes and Directed at the EU Institutions and the Member States. Yet, they fulfil a different function inasmuch as they are instrumental for the implementation of mentioned regulations and adopted as delegated acts by the Commission on the basis of relevant provisions contained in such regulations.

Having presented the varied architecture of the group of instruments at stake, let us move on to the manner in which they are created - and answer the question as to whether these comply with the principles concerning rule of law creation; how they are implemented - and investigate the fulfilment of the rule of law norm application criteria. Finally, let us focus on the extent of judicial control available and actually exercised in relation to the instruments at stake.

⁴³⁴ Op. cit., Articles 8 and 9. There are two groups of conventions to be ratified under the GSP+ arrangement (Part A – Core Human and Labour Rights UN/ILO Conventions and Part B – Conventions related to the environment and to governance principles).

II. Rule of Law Principles Concerning Instrument Creation

The rule of law principles concerning instrument creation refer our investigation to the treaty provisions that determine adoption of legislative acts - such as regulations, and common positions. Unlike in case of the instruments scrutinised in Chapter 4, it is much easier to attribute to these instruments features of the rule of law categories at stake. That is true, of course, inasmuch as one could deem the EU legislative process compliant with the principles of rule of law regarding norms creation which we consider as undisputable under premises of this study.

And so, both regulations were adopted in line with articles 209 and 212 TFEU (for the EIDHR) and Article 207 TFEU (for the GSP Regulation) on the basis of ordinary legislative procedure. Article's 289(1) TFEU ordinary legislative procedure stipulates that '(t)he ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Article 294.' Article 294 TFEU provides in greater detail for the specific steps in the process of adoption by the Council together with the Parliament of the legislative act. The process involves proposal by the Commission, followed by two readings' sessions in the Parliament - aided, need be, by the Conciliation Committee - and voting in the Council according to the general rule of qualified majority⁴³⁵. Since it is not the purpose of this study to evaluate the general EU legislative procedure, hence, we will not dwell into whether it permits for satisfactory, from the Rule of Law perspective, results. Let us, however, consider the extracted features of the rule of law in relation to the two regulations at stake.

It is important to note, that both the EIDHR and the GSP regulations are a part of the wider framework within which they are placed by relevant references to the Treaty articles. The EIDHR is a measure of development cooperation (Article 209 TFEU) as well as of economic, financial and technical cooperation with third countries (Article 212 TFEU), whilst GSP is one of trade measures adopted on the basis of Article 209 TFEU. Hence principles contained therein as well as the objectives the two instruments strive to achieve, fit into the categories of objectives broadly defined in these articles. That, and procedures at stake referring to

⁴³⁵ The qualified majority can be attained if three criteria are fulfilled: at least 55% of the members of the Council which comprise at least fifteen of them and represent Member States populated by at least 65% of the EU population. See: Article 16(4) TEU.

transparency permit for a conclusion that **transparency** condition is fulfilled for the instrument creation stage in this category. That conclusion is further strengthened by the **prospectivity** of the two regulations which are adopted in cyclical terms - coinciding with either budgetary procedure or long-term trade planning.

At the same time, since both the EIDHR and the GSP regulations are limited in time of their application, it is clear that they are renewed once their term of validity elapses. For the EIDHR this term coincides with the terms of EU financial perspectives which brings into the discussion of transparency additional dimension introduced by particularities of the EU budgetary process - at least inasmuch as the mere fact of prolongation of assistance within this instrument is concerned and the actual figures that are provided for therein.

GSP+ arrangement is an implementation of the 2004 Commission Communication 'Developing countries, international trade and sustainable development: the function of the Community's generalised system of preferences (GSP) for the 10-year period from 2006 to 2015' sets out the guidelines for the application of the scheme of generalised tariff preferences for the period 2006 to 2015, yet the 'the scheme should continue to apply for a period of 10 years from the date of application of the preferences provided for in this Regulation, except for the special arrangement for the least-developed countries, which should continue to be applied without any expiry date.'⁴³⁶ The Preambular declaration is reiterated in the text of the regulation determining that 'The scheme shall apply until 31 December 2023. However, the expiry date shall neither apply to the special arrangement for the least-developed countries, nor, to the extent that they are applied in conjunction with that arrangement, to any other provisions of this Regulation.'⁴³⁷

The content of the two regulations is also of general, non-arbitrary nature - the financial assistance or preferential treatment is to be granted to anyone who fulfils the objective criteria. For EIDHR the addressees of the assistance are: civil society organisations, human rights defenders, victims of repression and abuse⁴³⁸, whilst for the GSP Plus arrangement, these are defined in Article 9(1)⁴³⁹. In both cases the categories of entities are clearly

⁴³⁶ GSP Regulation, Preamble, at para. 6.

⁴³⁷ Ibid, at Article 43(3).

⁴³⁸ EIDHR, Article 1.

⁴³⁹ 'A GSP beneficiary country may benefit from the tariff preferences provided under the special incentive arrangement for sustainable development and good governance referred to in point (b) of Article 1(2) if: (a) it is

defined, though in case of the EIDHR the subject matter of financing will matter on grounds of specific tenders announced.

Finally, it seems that the obligations imposed by the two regulations are **clear** - and they distribute the tasks in an even manner: a beneficiary/third country needs to prove to the EU that it fulfils the conditions, whilst the EU will examine them granting or not the assistance (be it of financial or trade preferential type).

The general conclusion as for the fulfilment of rule of law criteria for regulations used by the EU in its external relations is overall positive, however, with one reservation. The creation of norms in this context is clearly the result of a long standing process of negotiation between the Union and 3rd countries and members of civil society. Yet, the mere process of adoption of regulations is, in its nature one sided for it is only the Parliament and the Council that can adopt a regulation. Justly so, for these are the EU institutions that administer the European Union funding. Though this statement dangerously echoes the realist critique of the EU and its external relations pursuit of human rights objectives, it had as its purpose pointing to the fact that the imbalanced setting of a *donor v recipient* of aid is to a certain extent amended by the EU through introduction of stringent procedures ruling norms application. Despite the standing imbalance of actors, the financial instruments represent a shift in an approach where the EU administers funding in exchange for human rights action. One could say that it eliminates an obstacle and creates incentive to abide by human rights standards. Or - in other terms - it administers the possibility to live up to such standards - if we conceive of

considered to be vulnerable due to a lack of diversification and insufficient integration within the international trading system, as defined in Annex VII; (b) it has ratified all the conventions listed in Annex VIII (the 'relevant conventions') and the most recent available conclusions of the monitoring bodies under those conventions (the 'relevant monitoring bodies') do not identify a serious failure to effectively implement any of those conventions; (c) in relation to any of the relevant conventions, it has not formulated a reservation which is prohibited by any of those conventions or which is for the purposes of this Article considered to be incompatible with the object and purpose of that convention. For the purposes of this Article, reservations shall not be considered to be incompatible with the object and purpose of a convention unless: (i) a process explicitly set out for that purpose under the convention has so determined; or (ii) in the absence of such a process, the Union where a party to the convention, and/or a qualified majority of Member States party to the convention, in accordance with their respective competences as established in the Treaties, objected to the reservation on the grounds that it is incompatible with the object and purpose of the convention and opposed the entry into force of the convention as between them and the reserving state in accordance with the provisions of the Vienna Convention on the Law of Treaties; (d) it gives a binding undertaking to maintain ratification of the relevant conventions and to ensure the effective implementation thereof; (e) it accepts without reservation the reporting requirements imposed by each convention and gives a binding undertaking to accept regular monitoring and review of its implementation record in accordance with the provisions of the relevant conventions; and (f) it gives a binding undertaking to participate in and cooperate with the monitoring procedure referred to in Article 1.'

human rights as a luxury only the developed part of world can afford (and even then - not fully).

III. Rule of Law Principles Concerning Instrument Application: Transparency and Equality

In examining the instrument application frameworks we shall address the manner in which the EIDHR and the GSP regulation incorporate the principles of transparency and equality. Yet again, transparency should come hand in hand in the application of these instruments, however, this is not always a case.⁴⁴⁰

In both cases, however, there is a factor that should substantively enhance both the transparency and equality in instrument application - namely the extensive use of procedures for the attainment of the goals of regulations. These procedures are not perfect, yet they represent a clear attempt to enhance both transparency and equality of the use of measures at stake.

In case of the GSP+ the procedure is initiated by an eligible (vulnerable) country which is to file a written request to the Commission accompanied by extensive information concerning the ratification of conventions (Article 9)⁴⁴¹. The Commission examines the request; at the same time it takes account of information gathered by European bureaus and agencies and takes decision as to granting the arrangement to a given country. The requesting country is to be notified of the decision, if it is negative it may require reasons as to why it was not granted the special incentive arrangement. There exists no reviewing procedure as to this decision though the requesting state having knowledge as to what were the reasons of the decision do file subsequent requests.

The above described procedure illustrates the positive conditionality adopted by the European Union while conducting its relations with third countries. The GSP provides also for the negative conditionality – i. e. the possibility to suspend the incentive arrangement in case *inter alia* the said conventions are violated (decision made on the basis of the observations of monitoring bodies) or the goods exported had been manufactured by prison labour (Article 15(1)). There is also a possibility to suspend the arrangement if a state fails to

⁴⁴⁰ See the EIDHR related case law discussed in Section IV below.

⁴⁴¹ GSP Regulation.

provide administrative cooperation required for policing requirements of the arrangements provided for within the framework of the GSP (Article 16). Such withdrawal is safeguarded by the clauses which oblige the Commission to beforehand undertake specific steps provided for by Article 16(3)⁴⁴². The suspension of the arrangement may not exceed the limit of six months. Once this time elapses, either the suspension is lifted, or the above described procedure is conducted. Importantly, according to Article 16(4) of the Regulation 'Any Member State may refer a decision taken in accordance with paragraph 3 to the Council within one month'. The Council may review such decision and change it within another one month.

As for the EIDHR, under the Horizontal Implementing Regulation⁴⁴³ the procedure takes the following sequence:

1. The Commission adopts annual action programs for financing and supporting measures (Article 2(1)) adopted in accordance with the examination procedure referred to in Article 16(3) subject to exceptions specified by Article 2(3).
2. The financing is conducted in the form of the types of financing envisaged by Regulation (EU, Euratom) No 966/2012, and in particular: (a) grants; (b) procurement contracts for services, supplies or works; (c) general or sector budget support; (d) contributions to trust funds set up by the Commission, in accordance with Article 187 of Regulation (EU, Euratom) No 966/2012; (e) financial instruments such as loans, guarantees, equity or quasi-equity, investments or participations, and risk-sharing instruments, whenever possible under the lead of the EIB in line with its external mandate under Decision No 1080/2011/EU, a multilateral European financial institution, such as the European Bank for Reconstruction and Development, or a bilateral European financial institution, e.g. bilateral development banks, possibly pooled with additional grants from other sources.
3. Article 4(3) of the Regulation stipulates that 'any entity entrusted with the implementation of the financial instruments as referred to in point (e) of paragraph 1 shall fulfil the requirements of Regulation (EU, Euratom) No 966/2012 and comply with Union objectives, standards and policies, as well as best practices regarding the use of and reporting on Union funds'. Hence no further information on the procedures are provided by the Regulation.

⁴⁴² Those three required steps involve: transmitting information to the Committee which is to assist Commission in implementing the Regulation on the basis of Council's Decision 1999/468, calling upon Member States to take such precautionary measures which are necessary to safeguard Community's interests, publishing information in the Official Journal of the European Union concerning doubts as to fulfilment of all conditions connected with the special arrangement.

⁴⁴³ Regulation (EU) No 236/2014 of the European Parliament and of the Council of 11 March 2014 laying down common rules and procedures for the implementation of the Union's instruments for financing external action, OJ 2014 L 77/95.

The provisions of the Horizontal Implementing Regulation provide also for monitoring (Article 12), annual reporting (Article 13) and consultation (Article 15).

It needs to be noted that if we follow the logic of the EU administering the financial assistance creating thus possibility to enhance the human rights standards in third countries where the aid arrives, then we must eye the assistance granting procedure as a procedure aiming at not only providing for clear conditions under which such aid is granted, but also fully informing the beneficiaries of the means through which they can act. There the EU institutions (in this case the Commission) act as if they were administrative bodies in the national legal context.

Hence, for the purposes of duly informing the recipients of the assistance, the European Commission has produced a number of documents which are to aid the beneficiaries in using the procedure. Thus there exists and extensvie Practical guide to the new GSP trade regimes for developing countries (December 2013), which provides a step-by-step checklist for the beneficiary state following the regime and availability thereof. Similarly, the Commission for its own purposes created a guide providing an overview of all the financing in the external relations sphere.⁴⁴⁴

Obviously, procedures are just a part of the picture; what is important is their application. This is done within the broader framework of human rights, development etc. policies, yet on the basis of annual programs and strategies which are adopted by the Commission on the basis of the basis provided for by the Regulation.⁴⁴⁵ The reports emphasise above all the engagement of the EU under the EIDHR with the civil society, and individual human rights defenders, though it is difficult to trace the latter due to the confidentiality of information on who they are. The 2013 Report on Human Rights claims that the EU provided support to the civil society activists and human rights defenders in more than 100 countries.⁴⁴⁶ And they have become the focus of the EU action following the 2012 Communication of the Commission 'The roots of the democracy and sustainable development: Europe's

⁴⁴⁴ European Commission, *Procurement And Grants for European Union external actions - A Practical Guide*. (2014).

⁴⁴⁵ See, for instance minutes of the Consultation Meetings with civil society organisations on EIDHR 201 Annual Action Programme which took place on 2 October 2009 as well as on EIDHR 2011 Annual Action Programme which took place on 27 September 2010. See also: EIDHR 2011-2013 Multiannual Indicative Planning. See the Factsheet: EU Strategic Framework on Human Rights and Democracy, Luxembourg, 25 June 2012, as well as: Annual Action Programme 2013 for the European Instrument for Democracy and Human Rights (EIDHR) to be financed under budget line 19 04 01 of the general budget of the European Union"

⁴⁴⁶ EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports), at 13.

engagement with civil society in external relations'.⁴⁴⁷ Generally it is hard to determine whether the use of the financial instruments such as the EIDHR fulfils in their application rules on transparency and equality. The data in these aspects is limited, and very much based on the activities of the Head of Missions. They are the one's responsible for both drafting calls and selecting grants (depending on the amount at stake, also together with Evaluation Committees).

The GSP+ is not an arrangement that is very much appreciated by the academics dealing with human rights aspects. It is considered inefficient, yet at the same time it has been prolonged until 2023 marking thus the cautious content on the part of both the EU and third countries with what it offers. In fact, the overall impressions of this instruments is that whilst they may not affect the existing situation, they can deter the states from adopting measures infringing upon human or labour rights.⁴⁴⁸

As for the GSP Regulation, its application frequently leads to a situation where a third country proves to be dissatisfied with the outcome of the procedure. Given the lack of access to the Court of Justice, as it was explained above, the Commission has developed a detailed appeal procedure. Even though the procedure itself gives the impression of being biased (whilst there are two different institutions giving their opinions - they are both the EU ones), it is ultimately immaterial as the request for granting of the special incentive arrangement can be re-submitted and granted at a later stage. The lack of definitive answer at this stage makes the lack of judicial control a bit more acceptable.

IV. Role of the Court: Availability of Judicial Review and Rule of Law Principles Concerning Conflict Resolution

Chapter 4 has already outlined the extent of the judicial control that could be exerted over the unilateral instruments. In this Chapter we are dealing with legislative instruments, hence the usual rules as to judicial review performance apply - this time not in a hypothetical

⁴⁴⁷ Communication of the European Commission

⁴⁴⁸ For sample of literature on the subject, see: Weifeng Zhou and Ludo Cuyvers, 'The roots of democracy and sustainable development: Europe's engagement with Civil Society in external relations' 45 *Journal of World Trade* 63, Lorand Bartels, 'The WTO Enabling Clause and Positive Conditionality in the European Community's GSP Programme' 6 *Journal of International Economic Law* 507, James Yap, 'Beyond 'Don't Be Evil': The European Union GSP+ Trade Preference Scheme and the Incentivisation of the Sri Lankan Garment Industry to Foster Human Rights' 19 *European Law Journal* 283. See also: Reinhard Quick and Ulrike Schmullig, 'A New Approach to Preferences: The Review of European GSP Scheme' 6 *Global trade and customs journal* 9.

manner. The usual critique of the narrow scope of such review not permitting access to courts to individuals can be applied as well to this area, however, we will leave this aspect aside examining the extent to which the judicial review is accessible within the legal system of the EU, and if so, the substantive content thereof.

As far as judicial controls with relation to the unilateral measures directed at third parties are concerned, we can speak of two types of controls that the CJEU performs. The first one refers to the control of legality of measures (1) and the control of individual cases (2). In the rule of law terms, the first type of controls refers to the norm creation stage, whilst the second type of control to that of norm application.

It needs to be underlined that there is relatively little case law referring to the financial instruments and the GSP that has been decided by the Court, and that it is disappointing in its content from the point of view both as far as the control of legality and of individual situation are concerned.

As for the legality, the case that has been decided by the CJEU concerns - and it is of course not surprising - the matter of legal basis. In the particular context of case C-403/05 *Parliament v Commission*⁴⁴⁹ the dispute concerned the Philippine border controls which were to be financed by the EU on the basis of Council Regulation (EEC) No 443/92 of 25 February 1992 on financial and technical assistance to, and economic cooperation with, the developing countries in Asia and Latin America (OJ 1992 L 52, p. 1), as amended by Council Regulation (EC) No 807/2003 of 14 April 2003 adapting to Decision 1999/468/EC the provisions relating to committees which assist the Commission in the exercise of its implementing powers laid down in Council instruments adopted in accordance with the consultation procedure (unanimity) (OJ 2003 L 122, p. 36; 'Regulation No 443/92'). Specifically, the European Parliament challenged the decision taken by the Commission approving a project relating to the security of the borders of the Republic of the Philippines to be financed by budget line 19 10 02 in the general budget of the European Communities (Philippines Border Management Project, No ASIA/2004/016-924). In the view of the Parliament, the measure pertained to the fulfilment of the objective to fight terrorism which should be dealt with under the CFSP legal basis and falls outside of the measure in question.

⁴⁴⁹ CJEU, Case C-403/05 *European Parliament v Commission of the European Communities* [2007] ECR 263.

In fact, the CJEU decided that the financed measure could not have been undertaken under the regulation at stake. The case itself is yet another of the long string of cases in which the Commission attempts to expand the limits of its competence and use the development and trade measures to pursue the CFSP objectives. The Court, in fact, observes sharply in paragraph 65 that analogous choices on the part of the Commission are immaterial for the case for it is essential that legal basis is chosen on case-by-case basis; in a conscious manner. The present case provides an example of the Court's attempt to ensure above all predictability of the content of laws as well as protecting clarity of provisions - this time concerning objectives and the manner in which they are fulfilled.

The control by the CJEU of individual cases is similarly infrequent, but provides us with invaluable information about transparency of the EIDHR implementation. In case T-17/10 *Steinberg v Commission*⁴⁵⁰ the applicant requested the annulment of the Commission Decision which partially refused him access to certain documents relating to funding decisions for grants to Israeli and Palestinian non-governmental organisations under the 'Partnership for Peace' programme and the European Instrument for Democracy and Human Rights (EIDHR). The case is very informative as to the extent to which the Commission considers that it is obliged to disclose the proceedings concerning grant applications to the public. Mr. Sandberg requested hundreds of documents to which the Commission replied with thorough analysis of the content of such documents in order to disclose to Mr. Sandberg only the ones that could not have harmed third parties - and especially the beneficiaries of the EU financial assistance. The Commission in refusing such access relied on Article 4(1) of the Public Access to Documents Regulation⁴⁵¹ which provides for mandatory exception to a general rule on access to documents of the European Parliament, Council, and the Commission. Such access is to be refused by the institutions if it was to undermine the protection of '(a) the public interest as regards *inter alia* public security; (b) privacy and the integrity of the individual, in particular in accordance with Community legislation regarding the protection of personal data.' In the present case the data concerned 'not only the persons working for the NGOs at issue and the other recipients of grants, but also the persons involved in the selection and evaluation process of the various projects

⁴⁵⁰ General Court, Case T-17/10 *Steinberg v Commission*

⁴⁵¹ Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ(2001) L 145/43-48.

concerned⁴⁵². The Court found Commission's position justified and dismissed the plea made by Mr. Steinberg in its entirety.

It must be emphasised for our purposes that Mr. Steinberg received volumes and volumes of information with exception of actual information on individuals and NGOs acting within the Partnership for Peace programme, evaluators of projects and individual scales and grades given to the projects. Hence, if need be the access to the information is granted to individuals on the basis of the Public Access to Documents Regulation, subject to terms and conditions contained therein.

The Court, in this context exerts control over whether the right to access to documents - including transparency, is dully enforced by the institutions with a caveat that it can only annul the decision of such institution - it is not up to the General Court to 'issue directions to it as regards the manner in which it is to comply with a judgment delivered in an action for annulment'⁴⁵³.

As we can see in none of the two exemplary cases are complaints made in relation to the human rights abuse. They concern predominantly the manner in which the EU legal framework permits the performance of broadly understood legality control of instruments at stake. From this point of view, the mere presence of judicial control does not provide for much of the value added to the pursuit of ultimate goal of human rights promotion and upholding. Yet, it makes a difference from the point of view of the fulfilment of rule of law criteria.

It needs to be noted, that in the light of the limited accessibility of the Court for conflict resolution purposes, another institution should be brought to our attention here. Given the inability to challenge particular measures before the CJEU, individuals and civil society organisations bring their claims to the European Ombudsman who on a number of occasions passed decisions in relation to the procedure of granting financial assistance on the basis of

⁴⁵² *General Court, Case T-17/10 Steinberg v Commission* , at para. 28.

⁴⁵³ *Ibid*, at para. 43 and para. 44 with reference to the standing case law on the issue: Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073, paragraph 15 and case law cited therein.

the EU programs.⁴⁵⁴ Such claims refer to the maladministration on the part of the institutions. In addition, the Ombudsman makes the recommendation to the institution as to the area where improvement of its practices is necessary.⁴⁵⁵

V. Rule of Law Assessment

It seems that from the point of view of rule of law criteria, the financial instruments and the GSP+ regulation fit in very well within the EU based rule of law system. They are created according to the ordinary legislative procedure, subject to review by the CJEU. They are applied subject to fairly stringent procedures contained in these instruments and at least one of the rule of law principles - transparency is controlled by the Court. We are lacking clearly the conflict resolution provisions, however, the procedures, at least to a certain degree, remedy the situation.

⁴⁵⁴ See, for instance: *European Ombudsman, Case no OI/5/2010/JF, decision of 12 December 2011* - in this case the decision of the European Commission not grant assistance due to the dubious financial situation of a claimant (Syrian NGO) was issued.

⁴⁵⁵ In the present case the Ombudsman noted: 'The Commission could reflect on how it might allow trustworthy NGO applicants to its calls for proposals which, at the time of submitting their applications, may not have sufficient funds of their own, to provide alternative evidence. Such evidence of funding could include signed commitments from external sponsors and/or bank guarantees, relating to their financial capacity to perform the Commission sponsored projects in question.' *ibid*, at

Chapter 6 – Bilateral and Multilateral Measures

I. Setting the Scene

The multilateral/bilateral instruments include international agreements and the soft law frameworks that have been devised by the Union in part for the preparation of the formalised cooperation, in part for the creation of a more solid platform in which the impact on third countries takes place. With reference to the human rights approaches, the EU in this context acts as a 'sovereign authority whose rulings are acknowledged as final'⁴⁵⁶. Political scientists point to argumentation and persuasion as necessary tools for the socialisation of the concepts promoted through policies. Soft law measures can be considered as legally delimited frameworks where such argumentation and persuasion takes place. As the result, the 'carrot and stick' on the part of the EU as perceived as a rational cost-benefit analysis, may give way to the principled belief. As the result the third country adopts the same approach as the EU towards a promoted value.⁴⁵⁷

Sensu stricto the legal binding multilateral/bilateral measures employed by the Union for the purposes of its external human rights policy are limited to the international agreements that incorporate the so-called conditionality clauses. Yet, to limit the discussion only to those instruments would exclude the extensive conditionality mechanisms developed within the accession process and European Neighbourhood Policy (ENP). Obviously, it is true that the ultimate goal of the Union is to enter into an international agreement with a third country, content of which needs to take on board human rights considerations as well as provide for the tools to execute the relevant provisions. Yet, before this agreement is made, what comes first is an extensive, strategically determined framework within which conditionality and assistance based negotiations take place. Hence, what we are interested in this study is the whole process of an international agreement making and the formal frameworks that have been devised for it for the benefit of human rights objectives (*inter alia*).

It is important to exclude from our discussion elements of the bilateral framework which belong purely to the realm of diplomacy: In the Table below these were marked separately

⁴⁵⁶ Dionysia Tamvaki, 'The Copenhagen Criteria and the Evolution of Popular Consent to EU Norms: From Legality to Normative Justifiability in Poland and the Czech Republic' in Wojciech Sadurski, Adam Czarnota and Martin Krygier (eds), *Spreading democracy and the rule of law? : the impact of EU enlargement on the rule of law, democracy and constitutionalism in post-communist legal orders* (Springer 2006), at 154.

⁴⁵⁷ *Ibid.*

as including also the issues connected with political dialogue. This one, in Strategic Framework and Action Plans terms is to be strengthened for two general purposes: firstly, for the enhancement of the EU presence on international stage - and especially on international forums, and secondly, for the improvement of actual practice of implementation of human rights related objectives and provisions of international agreements. That latter objective is obviously of much more relevance to our considerations here and it has direct impact on transparency and equality of the process especially at the application stage. From this perspective, the existence and extensive use of the dialogue is good from the point of view of rule of law as it implies equality between the EU and its partners who are participating on the same footing in the process of not only norms (including those of international reach) creation, but also could imply participatory model of norms implementation. But this is a rather optimistic manner of viewing political dialogue. In reality, the ongoing process of negotiation may lead to enhancing the inequality and pushing forward specific interests of other character.

Table 6: Bilateral and Multilateral Measures

STATE OF IMPLEMENTATION - 1 January 2014						
Objective	Instrument	Body Responsible	EU Document/Legal Act	Legal Act/Procedur	Addressee	Category of Instruments
4. Universal Adherence	Promotion of ratification and effective implementation of key international human rights treaties, including regional human rights instruments.		NA		EEAS, European Commission,	Multilateral (diplomacy)
	Collaboration with third countries to fully cooperate with UN Special Rapporteurs and Independent Experts on human rights, including through issuing standing invitations and receiving such experts.	third countries	NA		EEAS, European Commission, Member States	Multilateral (diplomacy) (UN)
	Shaping the Agenda on the UN level with reference to social and cultural rights	EEAS European Commission Member States	NA		UN	Multilateral (diplomacy) (UN)
11. Make trade work in a way that helps human rights	Reinforce human rights dialogues with FTA partners and strengthening of GSP plus mechanism.	EEAS European Commission (for GSP beneficiaries)	FTAs 2012 GSP Regulation		partner countries	Bilateral/Multilateral Unilateral (external)
	Inclusion human rights elements in the investment policy.	EEAS European Commission Member States	FTAs		partner countries	Bilateral/Multilateral
	Development of human rights criteria that are to be included into international arms treaties	EEAS Member States	international agreements	Article 218 TFEU	partner countries	Bilateral/Multilateral
13. Entrench human rights in counter-terrorism activities	Antiterrorist Dialogues with human rights components	EEAS CTC Commission	dialogue	NA	EEAS	Bilateral/Multilateral (diplomacy)
14. Ensure human rights underpin the external dimension of work in the area of freedom, security and justice (FSJ)	Ensure that human rights are taken into consideration during th FSJ Sub-Committees with third countries	EEAS European Commission	dialogue	NA	Institutions	Bilateral/Multilateral
16. Abolition of the death penalty	Lobbying on the UNGA 67 Resolution on the death penalty moratorium, in order to increase support among States while developing also further the content of the initiative.	EEAS Member States	NA	NA	UN	Multilateral (diplomacy)
	Ensure EU input to the World Congress against the Death Penalty 2013.	EEAS Member States	dialogue		third countries	Bilateral/Multilateral (diplomacy)
17. Eradication of torture and other cruel, inhuman or degrading treatment or punishment	Support and implement UN and Council of Europe anti-torture efforts, including support for the UN Special Rapporteur on Torture, the UN Voluntary Fund for the Victims of Torture, the OHCHR, UNCAT, SPT and CPT.	EEAS Member States	NA		third countries	Multilateral (diplomacy) (UN)
	Promote ratification and effective implementation of CAT and OPCAT emphasizing the role of independent and effective National Preventive Mechanisms.	EEAS Member States	dialogue		third countries	Bilateral/Multilateral (diplomacy)
18. Effective support to Human Rights Defenders	Promote improved access by human rights defenders to the UN and regional human rights protection mechanisms, and address the issue of reprisals against defenders engaging with those mechanisms.	EEAS Member States Commission	NA			Multilateral (diplomacy) (UN)
19. Promotion and protection of children's rights	Step up efforts to implement the Revised Implementation Strategy of the EU Guidelines on Children and Armed Conflict, and in particular continue to support the work of the UN SGSR CAAC and UNICEF.	EEAS Commission	NA			Multilateral (diplomacy) (UN)
	Ensure EU input to the World Conference against Child Labour.	EEAS Commission	NA			Multilateral (diplomacy) (UN)
21. Compliance with international humanitarian law (IHL)	Political dialogue (objective: to encourage third countries to ratify core IHL instruments and implement IHL obligations).	EEAS Commission	dialogue			Bilateral/Multilateral
23. Freedom of Religion or Belief	Initiatives at the UN level on freedom of religion or belief.	EEAS Member States	NA			Multilateral (diplomacy) (UN)
28. Promote the respect of the rights of persons belonging to minorities	Review best practice and ensure the use of existing EU instruments to support efforts to protect and promote the rights of persons belonging to minorities, in particular in dialogues with third countries.	EEAS Commission Member States	NA			Bilateral/Multilateral
29. A strengthened policy on indigenous issues	EU policy relative to the UN Declaration on the Rights of Indigenous Peoples, with a view to the 2014 World Conference on Indigenous Peoples	EEAS Commission Member States	NA			Multilateral (diplomacy) (UN)
32. Impact through dialogue	Establish priorities, objectives, indicators of progress for EU human rights dialogues and consultations, to facilitate their review.	EEAS Commission				Bilateral/Multilateral
	Perform a review regarding best practice in applying Articles 8 and 96 of the Cotonou Agreement, including how to ensure follow up.	EEAS Commission				Bilateral/Multilateral
	Make full use of recommendations from UPR, Treaty Monitoring Bodies and Special Procedures in engagement with third countries.	EEAS Commission Member States				Bilateral/Multilateral
33. Effective use and interplay of EU external policy instruments	Develop criteria for application of the human rights clause.	EEAS Member States Commission				Bilateral/Multilateral
34. Advance effective multilateralism	Develop and agree an annual approach to the identification of human rights priorities at the UN – and where relevant the ILO.	EEAS Member States	UN and ILO forums			Multilateral (diplomacy) (UN)
36. Strengthened regional mechanisms for human rights	Continue to engage with the Council of Europe and the OSCE and other regional organisations	EEAS Member States	third countries international organisations			Bilateral/Multilateral (diplomacy)

Even though dialogue is important, we shall not address it specifically in the course of the analysis of this chapter. Dialogue is a constitutive element of multilateral and bilateral practice of the international dealings, and regardless of the extent to which it is formalised, it cannot be considered as a separate form of instrument which could be assessed from the rule of law perspective.

The Strategic Framework and Action Plan, in fact, does not provide for creation of further elements - it is more concerned with improvement of existing practices. If we eliminate all the diplomatic objectives it analyses, we are left either with the review and improved use of inter-acting instruments in a given field (for instance, objective 28 in relation to minorities' rights), or the focus on the inclusion of human rights clauses and their use through development of criteria. Curiously, the European Neighbourhood Instruments (action plans) nor accession positive and negative conditionality are not addressed in much detail, however, since they also function within more rigid frameworks, they should be at a centre of our attention here inasmuch as fulfilment by them of human rights criteria is concerned.

Hence in the course of the next sections we shall address above all issues connected with human rights clauses and positive and negative conditionality introduced by means of action plans (that reflect to the large degree processes employed under the accession policy framework, without, however, the sanction consisting in delaying the accession). It needs to be noted that it is not our intention here to analyse the international agreements or action plans in much detail as it has been done elsewhere.⁴⁵⁸ The purpose of this section is to briefly these two instruments before proceeding to their analysis from the point of view of rule of law criteria.

⁴⁵⁸ For a systematic analysis of the EU agreements, see especially: Bartels, *Human rights conditionality in the EU's international agreements* Lorand Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' University of Cambridge Faculty of Law Legal Studies Research Paper Series Fierro Sedano, Albi Paivi Leino, 'European Universalism?--The EU and Human Rights Conditionality' 24 Yearbook of European Law 329 Jan Erik Wetzel, *The EU as a "global player" in human rights?* (Routledge 2011). For the analysis of the ENP, see: Christophe Hillion, 'The EU's Neighbourhood Policy towards Eastern Europe' in Alan Dashwood and Marc Maresceau (ed), *Law and Practice of EU External Relations: Salient Features of a Changing Landscape* (2008) Marise Cremona, 'The European Neighbourhood Policy More than a Partnership?' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008), or Andreas Marchetti and Rheinische Friedrich-Wilhelms-Universität Bonn Zentrum für Europäische Integrationsforschung., *The European neighbourhood policy foreign policy at the EU's periphery* (Rheinische Friedrich-Wilhelms-Universität Bonn 2006).

International agreements substantively may have as their object either solely human rights, or deal with human rights as one of the matters covered by the agreement.⁴⁵⁹ International agreements providing for the basis of general cooperation, on the other hand, constitute the core of our attention and will be analysed in-depth in the subsequent sections.

From our point of view the inter-action between international and European law matters inasmuch as the importation of human rights standards within an agreement is concerned. Especially human rights clauses serve two purposes – firstly, the reconfirmation of values the EU and the third country subscribes to. Secondly, the human rights clauses are included in international agreements in order to create the legal basis for human rights oriented action. They are treated there as the background within which ‘framework for cooperation’ is drafted. The position of international agreements is set within the EU legal order, yet the norms they incorporate not necessarily. From this perspective the determination whether the EU legal system is a monist or dualist matters.

Human rights clauses appeared in trade and investment agreements signed by the European Community as late as in 1990s⁴⁶⁰; yet, their origin may be traced back to the 1970s. At this time, the Ugandan dictator Idi Amin substantially supported by the European Community STABEX fund⁴⁶¹ intensified violent repressions over the Ugandan society. The European Community, fearing the loss of reputation, frantically needed to employ measures which would wash its hands clean of participation in atrocities committed under Amin's command which could have been well financed by the European aid funds. As a result, the European Community stopped providing this aid on the basis of Article 62 of the Vienna Convention on the Law of Treaties which allowed for termination of an agreement in case of radical change of circumstances (the *rebus sic stantibus* clause). Yet, because this termination ground could easily be contested by an affected state, the Community recognised the need to include some sort of an equivalent of Article 62 VCLT into its trade agreements.

⁴⁵⁹ To date there are only two examples of such agreements. In the first case the EU became a party to the UN Convention on the Rights of Persons with Disabilities. Recently, in execution of its obligation to accede to the ECHR, the negotiation process of the accession treaty came to an end.

⁴⁶⁰ The first agreement which contained an effective human rights clause was signed on 2 April 1999 between the EEC and Argentina. The EU external human rights policy began slightly later than that in internal sphere. See: Napoli, op. cit.

⁴⁶¹ Bartels, *Human rights conditionality in the EU's international agreements*, at 8-11. STABEX was soon later terminated because it proved to be yet another subsidy

It happened for the first time in the cooperation treaty with Argentina of 1990 at the request of the partner state⁴⁶². That development has been paralleled by the EU construing relationship with the Eastern European countries after the fall of the Berlin Wall.⁴⁶³ Very modest, declaratory, human rights clauses have been included in agreements ever since, yet the then prevailing form did not provide a specific basis for termination of an agreement which was searched for. The desired version of the clause was included later in the 1990s in agreements with the Baltic States⁴⁶⁴ and the quasi-final version – with Romania and Bulgaria⁴⁶⁵. And thus 'the human rights conditionality' took the form of a double clause construction endorsed by the Council and the Commission⁴⁶⁶ and the European Parliament'.

The first clause – the "Essential Elements Clause" defines human rights as essential elements of the agreement; the "Non-Execution Clause" determines that violation of the Essential Elements Clause is a 'material breach' or a case of 'special urgency' which allows for adoption of unilateral measures (even an agreement's suspension or termination) by a party to an agreement. Such construction was included in the Lomé Convention of 1995 and served as a model for subsequent agreements made by the Community.

The EU-Central America Association Agreement provides an example of how such clause is worded:

'Respect for democratic principles and fundamental human rights, as laid down in the Universal Declaration of Human Rights, and for the principle of the rule of law, underpins the internal and international policies of both Parties and constitutes an essential element of this Agreement'⁴⁶⁷

⁴⁶² EUROPEAN COMMISSION, 'Written Question No 617/93', 1993.

⁴⁶³ As Bartels recalls, this coincided with the adoption by the EU of a formal external human rights policy in 1991 (Commission of the European Communities., *Communication on Human Rights, Democracy and Development Cooperation Policy*, SEC (1991) 6 (1991) and subsequent Resolution of the Council and of the Member States meeting in the Council on Human Rights, Democracy and Development, 28 November 1991) and lead to the development and systematic adoption of human rights clauses by the EU. Bartels, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements', at 2.

⁴⁶⁴ The Agreement with Baltic states were signed in May 1992 - with Estonia– EEC trade and commercial and economic cooperation agreement with Estonia ; with Latvia – EEC trade and commercial and economic cooperation agreement with Latvia; with Lithuania. The essential elements clause referred to the Helsinki Final Act and the Charter of Paris for a new Europe.

⁴⁶⁵ The clause has been hitherto referred to as to the 'Bulgarian Clause'; though for the first time it was used in the Agreement with Romania signed on 1 February 1993/EC/MS Europe Association Agreement with Romania; Agreement with Bulgaria was signed on 8 March 1993 – EC/MS Association Agreement with Bulgaria .

⁴⁶⁶ See: European Commission's Communication COM/95/216 final, op. cit.

⁴⁶⁷ EU-Central America Association Agreement signed on 29 June 2012, Article 1.

With time the number of the Essential Elements Clauses increased substantially referring to the non-proliferation of weapons of mass destruction or combating terrorism.

The Cotonou⁴⁶⁸ and the CARIFORUM⁴⁶⁹ Agreements, which have substituted the IV Lomé Convention (at least to a certain degree) provide the most sophisticated example of Essential Elements Non-execution clauses as well as of elaborate alternatives to it.⁴⁷⁰ The Cotonou Agreement is particular also in the manner in which it provides for an innovative Non-Execution Clause known better as 'the Article 96 procedure' - we shall deal with it when analysing the Rule of Law Principles concerning instrument application.

⁴⁶⁸ Partnership Agreement between the Members of the African and Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part

⁴⁶⁹ Economic Partnership Agreement between the CARIFORUM States, of the one part, and the European Community and its Member States, of the other part

⁴⁷⁰ Article 2(2) of the CARIFORUM Agreement states: *The Parties agree that the Cotonou Agreement and this Agreement shall be implemented in a complementary and mutually reinforcing manner.*

The second bilateral framework to be taken into consideration when analysing pursuit of human rights concerns by the European Union has been devised under the umbrella of the European Neighbourhood Policy. The ENP uses Action Plans as core measures for differentiation its relations with neighbouring countries. It is important to note that plans are drawn jointly with the neighbouring countries concerned. They encompass the period of a minimum of three years, and are extended by mutual consent.⁴⁷¹ The procedure of negotiating of and Action Plans is initiated by the European Commission which prepares the country report identifying priorities' areas and subsequently (upon being granted permit to open negotiations in close cooperation by the Council) negotiates Action Plans. Significantly, the initial draft comes from the Commission and therefore reflects the Community, rather than partner states' approach. Action Plans need to be approved by the Council before they are forwarded to the Association or Cooperation Council which subsequently adopts them. They consist of a list of actions to be undertaken with the priority given to those actions which are connected with implementation of agreements. Such Action Plans are adopted as recommendations and are therefore non-binding documents which reflect the Union's soft power – that of persuasion. In terms of substance, Action Plans address the whole range of issues which are of importance for the enhanced cooperation between the Union and partner states. They also include lists of tasks in the field of human rights and democracy. The exemplary Action Plan for Ukraine lists 12 areas under the heading 'Democracy, rule of law human rights and fundamental freedoms' including recommendation as to ensuring international justice or prevention of ill-treatment and torture. After the adoption of a non-binding Action Plan, it is up to a neighbour state to implement it with the European Community's assistance granted within the framework of existing instruments – the ENPI and TAIEX. Progress in Action Plans' implementation is tracked by means of periodic reports prepared by the European Commission which indicate whether contractual relations with a given state may be furthered. As it has been indicated above, Action Plans encompass a period of three to five years – after this period they will be either extended by consent of the two parties, or renegotiated which allows for reviewing their scope and targets.

Under the umbrella of New Neighbourhood Agreements, Action Plans are to be substituted by the New Practical Instrument which is to facilitate decision making between parties.

⁴⁷¹ Council Conclusions, 14 June 2004.

Despite being negotiated, it is, in fact, unclear as to what extent Action Plans are drafted in a bilateral manner and involve actual participation of partner states. If they did, then this instrument would be one of the most promising, also in the field of human rights - negotiated with participation of interested states, specific, with clear incentive of furthering cooperation. The obvious doubt which arises in this respect refers to the point at which cooperation cannot be furthered any longer. Another critical point concerns the non-binding nature of Action Plans. Their significance would be definitely much bigger, were they binding and negotiated under Article 300 TEC, but it seems that in case of Action Plans soft persuasion, rather than strong obligation seems to be the objective.

Having briefly presented the two sets of instruments, it is time to move towards the evaluation of their creation from the point of view of fulfilment of rule of law criteria. To a certain extent, similarly to the unilateral measures adopted for external purposes, the analysis is made easier by existence of both international and EU legal rules according to which international agreements are made. Yet, the practice of the implementation of such agreements, due to the extensive use of diplomatic measures is somewhat blurred. From this point of view the proceduralization of political dialogue has a major value added to the transparency and equality of the process.

II. Rule of Law Principles Concerning Instrument Creation

As it was stated above, the rule of law principles concerning instrument creation should not be difficult to fulfil given an extensive procedural and legislative basis on which international agreements are made on the basis of the EU law.

Thus introduced arrangements above all contribute to the **transparency** of instrument making. International agreements are made on the basis of Article 218 TFEU which contains a very detailed procedure of how the agreements are made; procedure which is to be applied to the three types of agreements the EU can make. Yet the procedure provides only the second step in determining clear rules concerning agreements. First, the form of an agreement needs to be chosen - and the EU has a wealth of options to choose from. These involve Association Agreements, Partnership and Cooperation Agreements and sectoral agreements.

Association Agreements provide an all-embracing framework to conduct bilateral relations in order to attain trade purposes (hence progressively they will entail either creation of the free trade area, or customs union). According to Article 217 TFEU unanimity in the Council and the consent of the Parliament is required. These are agreements that 1) contain reciprocal rights and obligations (access to EU market in return for ie voluntary harmonisation of laws); 2) foresee common action and special procedure; 3) provide for privileged links between the EU and a third country; 4) are made from the perspective of the participation of a third country in the EU system. The examples of such agreements include the European Economic Area agreement between the EU and Norway, Iceland and Liechtenstein, the former Europe Agreements between the EU and Central & East European countries, the Stabilization and Association Agreements between the EU and Western Balkan countries as well as currently negotiated Association Agreements with the ENP countries to create 'deep and comprehensive free trade area'. Partnership and Cooperation Agreements, according to Article 212 TFEU concern are such agreements that pursue the objectives of economic, financial and technical co-operation measures, including assistance, in particular financial assistance, with third countries other than developing countries, are consistent with the developing policy of the Union and are to be carried out within the framework of the principles and objectives of its external action. These agreements in terms of content are very similar to association agreements, however, are supposed to entail much less advanced level of cooperation. Yet it is unclear whether this is truly the case or whether the difference between the two types of agreements is of purely cosmetic nature. If the latter is true, then it is indeed intransparent why a specific choice of a measure is made. Finally, the last form of international agreements made by the EU are sectoral ones pertaining to particular issues. The most famous example of these agreements involve 16 sectoral ones made with Switzerland.

From the human rights perspective, this distinction as to which agreement is made is important as the EU, following the recommendation by the Parliament⁴⁷² and the critical opinion of the Inter-Parliamentary Committee of 11 October 2011, human rights clauses are to be incorporated in all the association and partnership and cooperation. Sectoral

⁴⁷² Earlier on also expressed by the Council with reference to South East Europe: Council conclusions on the principle of conditionality governing the development of the European Union's relations with certain countries of south-east Europe, 29 April 1997. European Parliament 2002/2011(INI) > 2005/2057 (INI), op. cit.

agreements, as seemingly addressing issues that are of specific, concrete character, are left out from this category. This has already attracted critiques as in case of the Fisheries Agreement with Mauretania.

In terms of content, apart from the above described human rights clause, the parties are welcome to extend the human rights obligations if they so please. And this is frequently the case which can be only welcome as good development - the silver thread appearing in practice of most important instrument making.

As the example of such practice we can take, for instance the mentioned earlier CARIFORUM Agreement which is the first economic partnership agreement which includes provisions referring to specific aspects of non-state actors behaviour which may influence human rights and democratic principles elements of such agreements. The Agreement in its Article 72 obliges the EC Party and the CARIFORUM States to undertake necessary measures to ensure that:

'(a) Investors be forbidden from, and held liable for, offering, promising or giving any undue pecuniary or other advantage, whether directly or through intermediaries, to any public official or member of his or her family or business associates or other person in close proximity to the official, for that person or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, or in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.

(b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.

(c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.

(d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.'

The Agreement imposes therefore duties predominantly on the Parties to the agreement who are to create such legal investment instruments which will act watch over investors' actions. Such provisions, in line with the Objectives of the Strategic Framework and Action Plan should be incorporated in all investment treaties of the EU.

From the procedural point of view, the EU is to follow Article 218 TFEU according to which the primary responsibility for the negotiations rests on the Commission or the EU High Representative for Foreign and Security Policy should the agreement concern Common Foreign and Security Policy. The procedure involves participation of the Parliament in situations determined by Article 216 TFEU, in relation to:

(i) association agreements;

(ii) agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;

(iii) agreements establishing a specific institutional framework by organising cooperation procedures;

*(iv) agreements with **important budgetary implications** for the Union;*

*(v) agreements covering fields to which either **the ordinary legislative procedure** applies, or the special legislative procedure where consent by the European Parliament is required.*

The overview of the above measures permits for a conclusion that transparency was clearly an objective when the Lisbon Treaty was adopted. Still there remain some doubts as to whether, when and how the human rights concern enter the realm of international agreement making especially in relation to negotiations process.

The procedure for adoption of Action Plans is much less rigid, however, given their soft character very advanced. Action Plans are 'to be agreed jointly with the neighbouring countries concerned. They should have a minimum duration of three years and be subject to renewal by mutual consent. Such action plans should be based on common principles but be differentiated, as appropriate, taking into account the specificities of each neighbour, its national reform processes and its relations with the EU. Action plans should be comprehensive but at the same time identify clearly a limited number of key priorities and offer real incentives for reform. Action plans should also contribute where possible to regional cooperation.'⁴⁷³ The procedure of elaboration of an Action Plan requires that the Commission puts forward the proposal – on the basis of the 2004 ENP Strategy Paper and country reports. Once the Council welcomed the proposal, the Commission completed the first set of draft Action Plans addressed at the neighbours with whom the EU had association or partnership agreements. The Commission sent the draft Action Plans to the European

⁴⁷³ GAER Councils of 16 June 2003 and of 14 June 2004.

Parliament, as well as to the European Economic and Social Committee, and the Committee of the Regions for information.⁴⁷⁴ Once Council approved Actions, they were to be endorsed by Association/Cooperation Council with each of the partners concerned having as their legal basis the existent agreements with the partners.

The adoption of an Action Plan is therefore, a negotiated process with the Commission and requires an extensive dialogue reminding of negotiations of international agreements. As such it is not transparent, but it permits long term commitment which can be fairly easily adjusted to the requirements of the altered situation of attainment of pre-set objectives. It needs to be noted that as it was the case of the accession process, it is to large degree not the choice of instruments that will provide us with the information about rule of law but the frameworks within which they work.

With reference to the **clarity** of obligations, there are two observations that need to be made. Firstly, if we simply concentrate on the mere issue of conditionality, it is not exactly clear what happens once the essential element is not observed by the parties. Clearly, in some cases there are procedures in place which determine the path that are taken (see Cotonou agreement), however, in most cases there measure used is the political dialogue. This means that conditionality has the suspension results very infrequently. Is this desirable? And is it clear from the emphasis placed on the inclusion of human rights clauses that this is the manner in which things should function? Secondly, as for the content of agreements, it needs to be observed that the EU frequently evokes various international human rights treaties in order to strengthen particular commitments. The reasons for evoking specific treaties are not openly stated, and the practice is extremely incoherent giving rise to further doubts as to whether this criterion is fulfilled.

As for the **prospectivity** and **generality** of obligations, it seems that both international agreements and Action Plans fulfil the conditions of Rule of Law.

⁴⁷⁴ Commission of the European Communities., *Communication from the Commission to the Council 'On the Commission Proposals for Action Plans under the European Neighbourhood Policy (ENP) (COM(2004) 795 final)*, at 3.

III. Rule of Law Principles Concerning Instrument Application

We shall deal with **transparency** and **equality** of the application of the two instruments at stake, by now customarily, together.

Many of the above described solutions have had as their objective enhancement of the transparency, and therefore equality of the application of the instruments at stake. On the basis of international agreements with reference to human rights objectives there have been a number of innovative solutions employed. For instance, since 2003 permanent subcommittees were established under six agreements with a mandate to discuss human rights and democracy, and procedures have been devised in order to ensure better and more consistent human rights practice.

In relation to the latter, especially the so-called Article 96 of the Cotonou Agreement deserves attention.

Article 96 provides for an extensive consultation procedure involving political dialogue between the Parties. The procedure is restricted in time and should be completed in the course of 150 days⁴⁷⁵. It is to commence whenever a Party considers that 'other Party has failed to fulfil an obligation stemming from respect for human rights, democratic principles and the rule of law referred to in paragraph 2 of Article 9'. Should such situation occur, this Party is to supply the Council of Ministers with relevant information and invite the non-compliant Party to consultations 'that focus on the measures taken or to be taken by the party concerned to remedy the situation'.⁴⁷⁶ The initiated consultations and the measures thus taken must fulfil requirements set out in Annex VII, attached to the Cotonou Agreement as the result of first revision of the Agreement. Only if consultations fail or 'in case of special urgency'⁴⁷⁷ may the Parties resort to the "appropriate measures". Those measures are to be applied proportionally and in accordance with international law. Article 96(2c) states clearly:

⁴⁷⁵ Article 96(2a), third sentence, amended in 2005 as the result of revision of the Agreement: *The consultations shall begin no later than 30 days after the invitation and shall continue for a period established by mutual agreement, depending on the nature and gravity of the violation. In no case shall the dialogue under the consultations procedure last longer than 120 days.*

⁴⁷⁶ Article 96(2a)

⁴⁷⁷ Defined by Article 96(2b) as *exceptional cases of serious and flagrant violation of one of the essential elements referred to in paragraph 2 of Article 9, that require and immediate reaction.*

'In selection of these measures priority must be given to those which least disrupt the application of this agreement. It is understood that suspension would be the a measure of last resort'.

Thus worded Non-Execution clause therefore echoes Article 62 VCLT lying at the foundation of human rights clauses as incorporated into trade agreements of the European Union including the most advanced sanction provided for by this provision – the suspension of the Agreement.

Yet, even if the procedure itself is fairly elaborate and permits to address the human rights flaws in a fairly transparent and equal manner, the solution is not perfect and has not permitted for elimination of this facet of coherence, as reported by Bartels.⁴⁷⁸ Yet, it created the basis for future practice aiming at attaining such objectives, even if by providing the basis of making clear decisions that will constitute the body of specific type of case law which once systematised will permit for creating a constant practice.

Also in case of the Action Plans there are special sub-committees set up under these agreements for monitoring. These sub-committees consist of representatives of partner countries, MSs, European Commission, Council secretariat. Monitoring performed by them comes in hand with that performed by the Commission which bases its recommendation as to the future contractual bonds on reports it thus produces. Since Action Plans set the objectives for the neighbouring countries, once such objectives are attained, Action Plans require adjustment. The alteration of scope and goals thereof is conducted on the basis of interim reports prepared by the European Commission. If a partner state does not agree with findings contained in the report or if it considers its progress to be greater (or smaller) than the Commission does, the only way it can alter an Action Plan proposed by the Commission is by negotiating. Yet, since negotiations are conducted on the basis of the proposal prepared by the Commission and approved by the Council⁴⁷⁹, the Commission has a limited possibility of extending its proposal because of the Union's institutional constraints.

⁴⁷⁸ Lorand Bartels, 'The Trade and Development Policy of the European Union' in Marise Cremona (ed), *Developments in EU External Relations Law* (Oxford University Press 2008)

⁴⁷⁹ The Council by approving Commission's proposal grants to the Commission a quasi-mandate, not to be trespassed in the course of negotiations.

The above presented considerations with reference to the transparency and equality of the two presented measures do not permit for refutation of the claim that the EU external human rights policy, and human rights clauses in particular, are applied in a consistent manner. Yet, the existence of more and more proceduralised frameworks marks the movement in this direction.

IV. Role of the Court

With reference to the role of the Court of Justice of the EU in the context of multilateral/bilateral relations there are three aspects that need to be given due attention.

Firstly, we should focus on the traditional role of the court - international agreements are where issues of legality - and in particular - competence have been most frequently considered either in reference to an agreement as a whole or its particular parts.

Theoretically, the Court should also oversee the implementation of agreements. Yet, as it seems, in many aspects the Court has been considered inadequate for the performance of the latter function, hence within agreements such solutions appeared which provided for alternatives to Court's jurisdictions. Similar solutions have been earlier scrutinised by the Court with various results.

Finally, there are areas where Court cannot reach - it cannot for instance aid individuals that believe that practice connected with agreement implementations are incorrect or do not reflect the agreement. There alternative avenues of action emerge, albeit not with positive results.

There exists an extensive case law of the Court which refers above all referring to the competence to enter into a given contractual relationship by the EU, or the legal basis chosen for such action. Needless, to say, in this aspect Court's biggest role was to define the competence of the EU in external relations, yet it is of smaller relevance for this study.⁴⁸⁰

In the first case, the most notable examples involve Opinion 1/75 on Understanding on a Local Cost Standard where the Court was requested to assess whether the EU had a

⁴⁸⁰ Piet Eeckhout, *External relations of the European Union : legal and constitutional foundations* (Oxford University Press 2004) Edouard Dubout, 'The Protection of Fundamental Rights and the Allocation of Competences in the EU: A Clash of Constitutional Logics' in Loic Azoulai (ed), *The Question of Competence in the European Union* (Oxford University Press 2014)

competence to enter into an agreement on export aids where the CJEU for the first time provided the definition of an agreement, the opinion 1/94 concerning WTO agreement and Opinion 2/91 on the ILO convention. From the point of view of our considerations the most important case in this aspects was Opinion 2/94 which concerned the EU accession to the ECHR (2/94). Following the question by the Council as to whether the Communities had the competence to accede to the ECHR, and thus to deal with human rights issues, the Court pointed to the lack of the concurring stance of the Member States on the issue and to the insufficient legal basis in the Treaties. Given the lack of preliminary arrangements the Court proclaimed that it could not assess otherwise the compatibility with the Treaties. The opinion of the Court has been for a long time considered as the cornerstone of EU's inability to engage with the hard-core human rights arrangements; which is still a case today. However, following the entry into force of the Lisbon Treaty, the EU was given a specific competence to accede to the ECHR thus opening up this door for other human rights treaties.

As for the review of the measures that have been adopted by the EU within the international agreements, the court has made its position explicit on a number of occasions with reference to the institutional arrangements and dispute resolution mechanisms which were to be created outside of the EU legal order.

In the Opinion 1/76⁴⁸¹ concerning the establishment of the inland waterway vessels fund by Switzerland, the Community and its Member States the Court referred to creation of certain organs of the Fund, which would involve substantive participation of Member States and result in deprivation of the Union of its decision making power. Given such arrangements, the Court declared the agreement in this form as incompatible with the Community law. It stated that institutional arrangements involving the Community and its Member States are permissible only if they are not contrary to constitutional arrangements included in the EC Treaty.

In the same opinion the Court addressed the issue of the possibility of establishing a tribunal with concurrent jurisdiction with the European Court of Justice whose members would be also the Members of the European Court of Justice. In the light of the above, the Court

⁴⁸¹ Opinion of the Court 1/76 of 26 April 1977, [1977] ECR 741.

expressed hope that in interpreting the text of such treaty there would be a small possibility of interpretations giving rise to conflicts of jurisdictions, or divergent interpretations.

The ECJ only touched upon the issue of existence of two tribunals whose powers and composition⁴⁸² are overlapping – they would be both in the position to interpret the Agreement establishing the fund – and therefore the act of Community institutions. Whilst the ECJ eventually declared the Agreement as incompatible with the Community law, it need not have bothered with answering with the latter question. Instead, it expressed doubts as to the compatibility of such arrangement with the Community law and hope that discrepancies in adjudication would be minor.⁴⁸³

By means of Opinion 1/76 of 26 April 1977 the Court managed to determine the basis for its further case law with reference to any institutional/procedural frameworks to which the European Community might have transferred powers on the basis of agreements it entered into.

The two opinions of the Court: 1/91⁴⁸⁴ and 1/92⁴⁸⁵ contributed to a large extent to the discourse concerning external executive bodies established by the force of an agreement as well as external, independent of the Community judicial mechanisms. The opinions concern directly the creation of the European Economic Area.⁴⁸⁶

As it has been already mentioned, the draft EEA Agreement provided for establishment of two bodies which would parallel the Community ones – the EEA Council which was to give the political impetus to the cooperation and the EEA Joint Council which was to implement the Agreement and also provide the first instance of dispute settlement mechanism between the parties. In addition to this arrangement, the draft EEA Agreement created the EEA Court – an independent⁴⁸⁷ body which was also to deliver binding decisions concerning the interpretation of the Agreement. Furthermore, national courts of the EFTA states were given the possibility of requesting opinion of the European Court of Justice on issues

⁴⁸² As the Fund's Tribunal was to include judges of the ECJ.

⁴⁸³ Paras. 19 -22 of the Opinion, *ibid*.

⁴⁸⁴ Opinion of the Court 1/91 of 14 December 1991, [1991] ECR I-06079.

⁴⁸⁵ Opinion of the Court of 10 April 1992, [1992] ECR I-02821.

⁴⁸⁶ The analysis follows: BARBARA BRANDTNER, 'The 'Drama' of the EEA. Comments on Opinions 1/91 and 1/92', (1992) *European Journal of International Law*, .

⁴⁸⁷ Though having systemic connections with the European Court of Justice.

concerning the interpretation of EEA provisions which were identical with the provisions of the EC Treaty. The modalities of this procedure were left to the EFTA states. Obviously, this arrangement caused serious doubts as to its compatibility with the EU legal order, and therefore the Commission requested the Court's opinion with reference to, precisely, the EEA judicial mechanism.

Before addressing the direct enquiry of the Commission, the Court defined the fundamental difference between the objectives of the EEA (attainment of free trade and competition in economic and commercial relations) and the EEC (creation of Internal Market and Economic and Monetary Union, but in a long term perspective, the European Union) which will influence the interpretation of the EEA Agreement in line with Article 31 of the VCLT.⁴⁸⁸ Subsequently, the ECJ focused on implications concerning establishment of the independent judicial review. It observed that should the EEA Court attempt to define the notion of 'Contracting Parties', it would directly affect the division of the competences in the European Community.⁴⁸⁹ Decisions thus made would have been binding on Community institutions and the European Court of Justice, given the position of such decisions in the hierarchy of European sources of law.⁴⁹⁰ Furthermore, similarly to the decision 1/76, the Court detected the danger in participation of the ECJ in the EEA Court – danger which would have threatened their objectivity and impartiality.

Finally, the Court addressed the issue of preliminary questions which could be directed by national courts of the EFTA states to the ECJ – with this respect the Court decided that purely consultative position the Court would assume with reference to proceedings in front of EFTA states courts would go against its position as defined by the EEC Treaty and therefore constitutional principles of the Community law.

As the result, the Court found in its Opinion 1/91 of 4 December 1991 that '(t)he system of judicial supervision which the Agreement proposes to set up is incompatible with the EEC

⁴⁸⁸ See: Paras. 5 and 15.

⁴⁸⁹ Para. 35.

⁴⁹⁰ According to Barbara Brandtner, though, 'the ECJ could be bound by rulings of the EEA Court only in so far as these addressed EEA rules corresponding to secondary Community norms (...) and only if the EEA Court's interpretation did not run counter to the Treaties, but not by provisions equivalent to primary Community law'. Barbara Brandtner, *op. cit.*, pp. 309-310, footnote 55.

Treaty'.⁴⁹¹ The EFTA states undertook to negotiate another draft agreement and incorporated most of the comments of the European Court of Justice. In turn, it approved the EEA Agreement⁴⁹² in its Opinion 1/92⁴⁹³, accepting the changes introduced by the EFTA states and the Community as the result of subsequent negotiations. As the Court recalled in its subsequent opinion concerning the ECAA Agreement '(t)he Court has already recognised that an international agreement entered into by the Community with non-Member States may affect the powers of the Community institutions, without, however, being regarded as incompatible with the Treaty. As it found in its Opinions on the draft agreements relating to the creation of the EEA, such an agreement is regarded as compatible with the Treaty provided it does not alter the essential character of the powers conferred on the Community institutions by the Treaty'.⁴⁹⁴

Despite the clear stance on the part of the CJEU as to the permissibility of creation of the EU external dispute resolution mechanism, such mechanisms continue to be inserted into the agreements. The Cotonou Agreement provides for an advanced dispute settlement mechanism which makes use of institutional framework envisaged therein. All disputes are to be submitted to the Council of Ministers or to the Committee of Ambassadors (should there be no meeting of the Council of Ministers at the time). Should the Agreement institutions fail to resolve a dispute, a panel of three arbitrators is to resolve a dispute. Arbitrators are to decide upon the procedure which is to be applied in a given dispute, yet if no such decision is made rules of Permanent Court of Arbitration for International Organisations and States should apply. Importantly, panel's decision is to bind Parties to the Agreement who are *to take measures necessary to carry out the decision of the arbitrators*.⁴⁹⁵

Similarly to the Cotonou Agreement, the CARIFORUM has created a very elaborate dispute avoidance and settlement mechanism which, according to Article 203(1), in its scope involves application and interpretation of the Agreement and therefore disputes concerning

⁴⁹¹ Opinion of the Court 1/91 of 14 December 1991, [1991] ECR I-06079.

⁴⁹² In the finally adopted version of the EEA Agreement the EEA Joint Committee has a power to settle disputes, the decisions of the European Court of Justice are clearly binding it. The Committee is to conduct also the review of the case law of the Court in order to ensure the homogeneity of the legal orders (as far as it is possible, given different objectives of the EEA Agreement and the EEC Treaty).

⁴⁹³ Opinion of the Court of 10 April 1992, [1992] ECR I-02821.

⁴⁹⁴ Opinion of the Court 1/00 of 18 April 2002, ECR 2002 I-03493, para. 20.

⁴⁹⁵ Article 98 of the Cotonou Agreement

Essential Elements and Non-Execution Clauses as incorporated directly into the CARIFORUM from the Cotonou Agreement⁴⁹⁶. The dispute avoidance mechanism consists of consultations and mediation. The dispute settlement mechanism, on the other hand, is based on the WTO dispute settlement mechanism, yet with some additional improvements (such as the publicity of meetings and reports). Findings of panels are binding for the Parties. The CARIFORUM Agreement provides also for the review mechanism of measures taken to comply with the arbitration ruling.

Similarly, in search for an alternative, the individuals seek access to some sort of body which can address the issues connected with the implementation of the EU human rights issues. Yet again, the European Ombudsman is an addressee of such claims. For instance, in a recent one he addressed an issue of non-suspension of an EU-Vietnam agreement⁴⁹⁷ following the human rights abuses that took place in Vietnam. When finding the claim unfounded, the Ombudsman referred to the Commission evaluating the use of the suspension on the basis of principle of proportionality thus providing a theoretical measure through which the practice of agreement implementation can be addressed.

V. Rule of Law Assessment

From the rule of law point of view international and multilateral arrangements are of very uneven nature. On the one hand, they are extremely well provided for - with clear, precise and detailed rules of agreement making. Yet, these rules become diluted in the negotiation and dialogue process inherent for international norm creation and application. Nevertheless, the evaluation of the fulfilment of rule of law must be determined as positive.

⁴⁹⁶ Article 206 – 223 of the CARIFORUM Agreement

⁴⁹⁷ *European Ombudsman, Case no OI/5/2010/JF, decision of 12 December 2011*

Part III - Beyond the Rule of Law Paradigm

Chapter 7 - Through the Sieve Effect of the Rule of Law Benchmarks

What if the rule of law lens employed by so many authors is simply out-dated? What if it just fails to analyse the reality where the executive needs to react in a quick manner and requires, therefore, flexible legal instruments? What if the EU has already developed such a framework; it is simply overshadowed by the – no matter how well justified but inadequate for purposes at stake - constitutionalist concerns?

The analysis performed in Part II was underpinned by the above-posed set of questions, and with the view of addressing them the image of the sieve has been introduced. During the analysis performed in Part II we have dealt with what was kept by the Rule of Law sieve. Now it is time to plough through all that was not included by it in search of the meaningful elements of the EU external human rights policy - such that would permit us to evaluate the policy in a more comprehensive manner.

Of help in this process may be the political science outlook on the policy making and especially the circularity of the process. Some aspects thereof were mentioned in the above performed analysis; others went missing.

The mere concept of the policy cycle can be viewed in multiple ways⁴⁹⁸ - from the basic five element format⁴⁹⁹ to eight component one by Bridgman and Davis⁵⁰⁰. Whilst the choice of the concept of policy cycle and its most important components can be disputed, addressing thus arising controversies is not my purpose here. Its utility, from the perspective of this study, presents itself in pointing to the direction which rule of law fails to take account of.

⁴⁹⁸ See, for instance: Judith V May and Aaron B Wildavsky, *The policy cycle* (Sage publications 1978), Michael Howlett, Michael Ramesh and Anthony Perl, *Studying public policy: Policy cycles and policy subsystems*, vol 163 (Cambridge Univ Press 1995)

Werner Jann and Kai Wegrich, '4 Theories of the Policy Cycle' Handbook of public policy analysis 43 HK Colebatch, *Beyond the policy cycle* (Allen & Unwin, Sydney 2006) Werner Jann and Kai Wegrich, 'Phasenmodelle und Politikprozesse: der policy cycle' Lehrbuch der Politikfeldanalyse, München/Wien: Oldenbourg 71The policy cycle analysis is known also as stages heuristic; see: Paul A Sabatier, 'The need for better theories' Theories of the policy process 3 H Jenkins-Smith and P Sabatier, 'The study of public policy processes' P Lee, C Estes, & F Rodriguez, *The Nation's Health* 135etc.

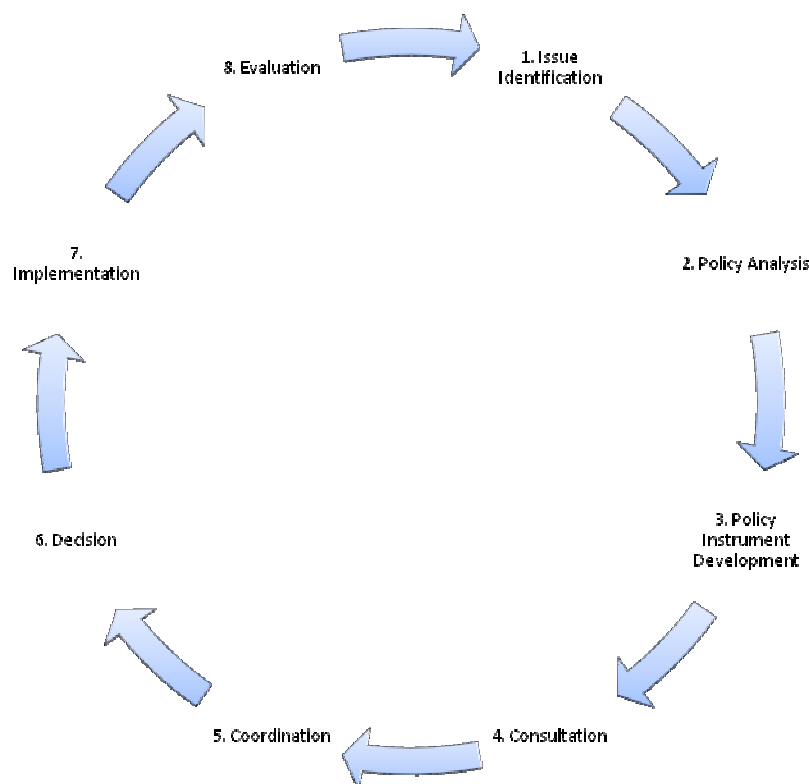
⁴⁹⁹ Daniel Lerner and Harold D. Lasswell, *The policy sciences; recent developments in scope and method* (Stanford University Press 1951).

⁵⁰⁰ Catherine Althaus, Peter Bridgman and Glyn Davis, *The Australian policy handbook* (4th edn, Allen & Unwin 2007)

Needless to say, if we are to pursue the analysis of legal aspects of the EU external human rights policy, we will need to look for the adequate terms to approach the policy.

Bridgman and Davis's model of policy cycle, known also as Australian Policy Cycle, present a very detailed account of the stages of policy making. Importantly, it is emphasised that the circular model is not completely chronological. In other words, the policy cycle, once set in motion consists of a number of overlapping cycles: each focused on one or two sets of instruments. In the particular context of EU external human rights policy this is even clearer if we consider the fragmented context in which the objectives of our policy are addressed (development, commercial, migration policy) unified by the tool applied in a given context. The policy cycle should be by no means considered as a static phenomenon – it is a way more complex process. The details, however, point to the focal points important from the perspective of settings going beyond constitutionalism which take into account much less formalistic (and much more realistic) accounts of toolbox creation and implementation.

Graph No 2: The Australian Policy Cycle⁵⁰¹



⁵⁰¹ Graph after: ibid26.

It needs to be noted that applied policy cycle does not need to follow all of the eight stages, in some cases the stages may overlap one another. Yet this way of envisaging the policy cycle permits for a fuller appreciation of instrument development and implementation. The policy cycle will provide to a certain extent a roadmap for the analysis of this Chapter. The table ascribes to each of the stages of the policy cycle, the existing EU policy and legal instruments as well as the identified rule of law benchmarks.

Table No 7: Policy Cycle Applied to the EU External Human Rights Policy

	Stage in the Policy Cycle	Rule of Law Benchmark (if applicable)	European Union Instruments (that produce ultimately legal effects)
1	Issue Identification		Treaty provisions (resulting from the lengthy historical process)
2	Policy Analysis		EU Human Rights Strategy and the focus on existing instruments
3	Policy Instrument Development	Rule of law principles concerning norms creation	Selection for Instruments ranging from bilateral binding ones (international agreements), through unilateral actions, to diplomatic ones.
4	Consultation	Rule of law principles concerning norms creation (but only to a certain degree) and application	Depends on the instrument
5	Coordination	Rule of law principles concerning norm application	Depends on the instrument
6	Decision	Rule of law principles concerning norms creation	Depends on the instrument
7	Implementation	Rule of law principles concerning application of the created norms Rule of law principles concerning conflict resolution	Depends on the instrument
8	Evaluation	Rule of law principles concerning norms application	Depends on the instrument

The above presented breakdown of the stages of the policy cycle when confronted with the rule of law benchmarks identified in Chapter 2 and applied to specific instruments in Part II illustrates the inability of the rule of law model to grasp the totality of the processes (also those highly formalised ones) that constitute the EU external human rights policy. It seems that, from the policy cycle perspectives, the Strategic Framework and Action Plan on Human Rights and Democracy succeeds at identifying the policy problems and tools to address them. The Action Plan refers to them as the 'existing body of EU policy on human rights and democracy in external action, notably EU guidelines, toolkits and other agreed positions and the various financial instruments, in particular the European Instrument for Democracy and Human Rights'⁵⁰². Notably, the Strategic Framework and Action plan illustrates another important feature of policy cycle conceived of as analytical tool. Namely, unless coordinated in a very precise outward looking manner, mini-policies focused on a use of a specific instrument, will overlap and may be found at a completely two different stages of their implementation. This may have clear implications on the coherence of the overall policy, however, not such that could not be amended. The circularity of processes which constitute policy cycles and the fact that they do not require that all of the stages are fulfilled makes it possible for various cycles to come in tune; diverging the speed at which they progress if necessary.

Table no 7 illustrates quite well how limited, even though essential, is information about the policy that is given to us by the sieve of rule of law. It is by all means essential as it provides for the boundaries within which the policy instruments operate and justly so. Therefore, if at the end of this study we are to arrive at any conclusions, as to whether the framework of evaluation should entail either rule of law or another theoretical framework, it needs to be stated that the answer should be that the two should be complementary. They need to be complementary also for another reason, illustrated to an extent by policy cycle analysis - at stage 3 of the cycle where the choice as to instruments is made, this can be choice of one or more instruments. It is, in fact, one of the biggest shortcomings of the rule of law framework of analysis - whilst it permits to take account of the formal basis of interactions between different sets of instruments, it does not allow for qualitative evaluation of how they work

⁵⁰² EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12)EU Action Plan on Human Rights and Democracy – introductory phrase.

together. This is partially so, because the norm application stage is not mirrored by the case law in the area. And there is a bit of such interplay which could be illustrated by, in part objectives pursued by specific instruments (i. e. implementation of the provisions of the treaty especially from the financial point of view (eg ENPI); piercing the sovereignty veil addressing non-governmental entities and NGOs (EIHRD) and allowing for privileged treatment in addition to the obligations stemming from the treaty (GSP+)), but also in the choice of each of measures should come into play in a given context. The latter argumentation was scrutinised by the Ombudsman in his decision concerning the non-suspension by the Commission of the international agreement made with Vietnam.⁵⁰³ Interestingly, the choice of various instruments is noted by scholars, but not much attention is paid to premises on which such choices are made. It is as if the Commission was always acting on the basis of some pre-conceived interest scheme which is way more complex and strategically planned than we could possibly understand, or as if the choices made by the Commission were completely random. Rosas observes in this vein:

‘Behaviour deemed to be in violation of the human rights clause may lead to the suspension of unilateral financial assistance or of trade preferences, or the operation of an agreement. Sometimes funds are frozen, travel bans imposed on the leading circles of a particular regime, and/or arms exports prohibited, as demonstrated by the recent sanctions against the Qadhafi regime in Libya. Sometimes a carrot in the form of financial assistance can function as a stick as well: for instance, support for a non-governmental organisation may be viewed as an unfriendly act by the regime in power in the recipient country.’⁵⁰⁴

None of the choices above seem to be either random or forcing a specific EU-friendly solution. The question appears as to whether, and if so, which principled reasoning the Commission uses (such as the use of principle of proportionality - see the above referred to decision of the Ombudsman on Vietnam Agreement⁵⁰⁵) and what kind of implications it has over policy choices.

What the Sieve Does not Catch

The below sections will present short observations as to what was left outside our earlier considerations. These observations are arranged according to the group of instruments we

⁵⁰³ *European Ombudsman, Complaint No 933/2004/JMA, decision of 28 June 2005*, op. cit.

⁵⁰⁴ Rosas, ‘Is the EU a Human Rights Organisation?’, at 13-14.

⁵⁰⁵ *European Ombudsman, Complaint No 933/2004/JMA, decision of 28 June 2005*, op. cit.

had analysed before, thus they build to a certain extent on the comment pertaining to interconnectedness of instruments as stated above.

With reference to the unilateral instruments directed at the EU institutions and its Member States (Chapter 4), the important part of instrument creation consisted in the consultation with various stakeholders, as well as inherent evaluation process of instruments that in part have already been in place. Interestingly, the consultation process contributes in this case to the attainment of the objective of transparency. As it has been demonstrated above, frequently the information on consultations can be found on the sources belonging to the NGOs, whilst they would be inaccessible (or lost) within the archives of the EU institutions. Furthermore, these are the NGOs that push for the introduction of monitoring mechanisms inducing further the accessibility of information and transparency. Hence, the actions of the NGOs have an indirect impact on the transparency and equality of the EU actions.

The European Parliament, as we saw, conducts a very useful controlling exercise by commissioning drafting of studies and reports on actual application of given instruments. The information thus obtained serves as the basis for recommendations and ultimate revision of the instruments at stake. Both in case of the NGOs and the European Parliament we are dealing here with the external control putting in place not only the mechanisms for enhanced transparency, but exerting monitoring and evaluation exercises, albeit on an *ad hoc* basis.

As far as the unilateral instruments adopted for external purposes directed at third countries and the members of the civil society (Chapter 5), the setting becomes much more interesting - Article 15 of the Horizontal Implementing Regulation provides for the involvement of stakeholders of beneficiary countries of financial instruments. The provision reads:

'The Commission shall, whenever possible and appropriate, ensure that, in the implementation process, relevant stakeholders of beneficiary countries, including civil society organisations and local authorities, are or have been duly consulted and have timely access to relevant information allowing them to play a meaningful role in that process.'⁵⁰⁶

It is a mandatory provision obliging the Commission to take such measure - hence consultation is formally a part of implementation of EU's financial regulations.

⁵⁰⁶ Regulation on Implementation of the Union's instruments for financing external action

As for the evaluation processes, within the units of the Commission dealing with external assistance, extensive body of know-how has been developed in order to facilitate evaluation and monitoring.⁵⁰⁷

Finally, within this group of instruments policy analysis as well as issue identification is, in part based on the documents produced within the process of consultation and evaluation, and subsequently given voice in the form of multiannual programs, annual action plans (these differ depending on an instrument). Each of the regulations permits the Commission to issue such act, thus facilitating incorporation of what has been uncovered in the process of evaluation and consultation into the instrument implementation.

Finally, the Chapter 6 devoted to bilateral and multilateral agreements referred in the large part to action plans - policy tools developed within the realm of the European Neighbourhood policy and fully based on the policy cycle. Furthermore, the proceduralised aspects of essential elements clauses as used in Cotonou and CARIFORUM agreements point to a much more nuanced approach to the instrument implementation than a simple positive-negative application of the clause. Again, these conditions are based on the legal text; hence if we are to look for policy cycle elements, they are inherent for the legal framework and regulate the processes concerning the application of instruments.

If we recall which elements of rule of law were taken into consideration in the analysis of the Chapter 6, we can see that only limited conclusions can be drawn on the basis of the rule of law. This goes back to Waldron's criticism against rule of law as a concept - the criticism according to which rule of law focuses on the static context, rather than a changeable one - as in case of external relations. However, even if the context itself is a changeable one, what remains the same is the EU's desire to affect third countries with its values and manner in which it deals with specific problems.

The need to maintain the force of attraction of the EU external human rights policy is pursued has been noted in literature. In words of Rosas '(t)he main emphasis is on the carrot (for instance, financing various projects and programmes in third countries or trade

⁵⁰⁷ Directorate General External Relations; Directorate General Development; EuropeAid Co-operation Office; Joint Evaluation Unit, *'Evaluation Methods for the European Union's External Assistance* (Office for Official Publications of the European Communities 2006), two volumes, one no methodology, the other on tools.

preferences accorded to such countries) but the use of the stick is not excluded.’⁵⁰⁸ The incentive approach is where the strength of the EU human rights policy lies. The leverage that comes with tightened collaboration with the European Union is what has been making the policy appealing and tools more effective than the usual international legal arrangements. The challenge is to preserve such force of attraction in the altering global environment whilst also maintaining and developing further the legitimacy connected with experimentation - a brand quality of the EU.⁵⁰⁹ And in order to meet this challenge, it is necessary that the policy itself is viewed in a broader manner. The following chapter offers one of the alternative modes of doing so.

⁵⁰⁸ Rosas, ‘Is the EU a Human Rights Organisation?’ at 13.

⁵⁰⁹ Daniel C. Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ [The Yale Law Journal Company, Inc.] 115 The Yale Law Journal 1490

Chapter 8 - Beyond Rule of Law Framework for the External Human Rights Policy of the European Union – governance and experimentalism

I. Introduction

The above chapters followed the analytical framework underlying the literature focusing on the external human rights policy of the European Union – that based on the rule of law paradigm. Whilst in case of the EU internal dealings the traditional conceptions of rule of law and democratic safeguards prevail, so far the external sphere ruled by international law required solely classical compliance. Obviously, the two – internal and external legal frameworks - whilst enabling achievement of the set objectives, have their own limitations. Some of these limitations result from particular design of the European polity and the idea of external policy promoted by its institutions. Other limitations, especially the incoherent enforcement of available measures in relation to third states, result from the intrinsic characteristics of international law and an essential flexibility allowing any international actor to pursue its objectives in the international context. In a sense, the critical voices uttered against the external human rights policy of the European Union could be applied to any European policy, which is linked to the external sphere and affects the internal dealings. Thus, in any such case, and in case of external human rights policy in particular, the analysis grounded solely on the paradigm of rule of law proves insufficient. There are two reasons why that is so.

Firstly, the rule of law paradigm relates only to the authority versus individual relationship; it does not account for the behaviours of other actors. Thus the assumed approach to the EU as to the legislator in dealings with third states is blind to a much more complex reality than this portrayed by rule of law approaches. When the EU ‘legislates’ for third states, it also creates rules for actors and individuals within those third states. In external dealings the rule of law paradigm ignores actors other than states, whilst not providing the protection analogous to the one granted to individuals internally. Furthermore, the paradigm does not take into account processes which occur when those actors make themselves heard, that is even more visible if we eye the totality of the instruments employed in a given field as it is the case when we employ the policy cycle type of analysis.

Secondly, as it was observed, the ideal of rule of law has undergone continuous evolution over the years; it truly is a contested and unclear concept⁵¹⁰. As such, though part of the constitutional triad, it is hardly accepted as a means to other ends. As Walker observes, rule of law consisted of many overlapping dimensions. The instrumental dimension developed in the last 30 years has complemented the regulatory and authorisation dimensions.⁵¹¹ Walker explains:

'By the instrumental dimension of the rule of law we mean the way in which it may be understood as a means to the realisation of the other ends⁵¹² rather than simply as a regulatory end and a good in itself. These extrinsic and instrumental benefits are in theory wide-ranging, but we may identify three clusters, which have tended to predominate in the historical analysis of the instrumental benefits of the rule of law. In the first place, there is the idea that a settled prospective, and a general framework of laws serves to protect the patterns of property rights and the predictability of exchange necessary for good commerce in general, and capitalist commerce in particular. In the second place, there is the idea of a settled, prospective and general framework of laws as the crystallisation and perfection of the will of 'the people' under a system of representative democracy. In the third place, and reflecting the post-substantive 'procedural turn' in legal thought over the past 30 years, there is the idea of law decision-making rules that, in their reliably settled, prospective and general character, are capable of responding accurately, fairly and effectively to the growing variety of decisional spheres within society and the increasing diversity and complexity of interest and preference constituencies affected within and across each of these spheres.'⁵¹³

Walker defines this trend in rule of law literature, but he does not seem to believe in it. The Ockham blade simplicity (though, according to some, not characteristic for the European Union⁵¹⁴) of rules cannot provide all the answers, neither can it respond to complex diverse

⁵¹⁰ Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?'

⁵¹¹ Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue'

⁵¹² Tamanaha, *Law as a Means to an End Threat to the Rule of Law* Cited in: Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue' at 121.

⁵¹³ Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue' at 121-122.

⁵¹⁴ 'The reliance and emphasis placed on law has built an unspoken acceptance of notions of modern Western law and its processes so as to establish order, clarity and a degree of certainty for the settlement of disputes and for planning by those constituents who are affected by its application. It enables expectations to be given some degree of shape. This is a common attribute ascribed to law across a range of legal philosophies. Even amongst legal pluralists or post-modern analysts there is recognition that the force of law necessitates a degree of certainty within at least local or systemic parameters. Otherwise, the charge of arbitrary decision making is raised to undermine the whole premise for a particular system of law and the political order over which it is supposed to rule.

But notwithstanding this necessary quality, law in the EU has had to evolve, as already suggested, within geographical, political, philosophical and constitutional environment that remains steadfastly conditioned by uncertainty to the point of indeterminacy. It has had to respond to significant debate and shifting patterns in political direction, in perceived threat, in economic conditions, in geo-politics, in demographics, and in constitutional structure. So we have law that has been provided with few constitutionally-fixed coordinates. How then can those values preferred politically and thus supposedly to be applied through law be protected so as not to go beyond reasonable uncertainty and become indeterminate in content and tone?(...)

interests and preferences. In addition to the above, the ideal of rule of law mainly determines the conditions, which need to be fulfilled for the society to be able to rely on law and institutions that are to ensure state's due action should the standard not be met. In other words, rule of law mainly applies to norm creation principles, delimited by judicial review. As we saw, the EU acts as a good legislator within the internally defined constraints (which as off the Treaty of Lisbon have the name and binding legal nature) which underlie judicial scrutiny of the Court of Justice of the European Union. It also complies with internal and external obligation to uphold and promote human rights. It could be claimed that the treaty makers have responded to criticisms rendering the internal and external dimensions of the policy more coherent. On the other hand, they have departed from the principle of equality of international actors, imposing the EU standards as reference point in external dealings.

Yet, norm application relating to the external human rights policy of the European Union is different. This is so not only because here instead of enforcement (externally or institutionally induced one) we need to speak of compliance (more voluntary). The difference results, first, from the fact that human rights as a pursued external policy objective, most probably, to a much higher degree enter the sphere of sovereignty of other states. Furthermore, on the level of inter-state relations the policy obviously underlies rules of political process, which in the sphere of human rights policy is highly complex and controversial. This happens because the traditional external human rights policy instruments either relate to other policy objectives or oppose them. Trade, control of migration flows, security concerns find themselves too frequently intertwined in nexuses with what is to be promoted and upheld⁵¹⁵ and tend to prevail over the latter. Thus, any radical measure resultant from essential element doctrine is likely to conflict with other policy interests (not to mention the . On the other hand, the suspension of an international agreement of general nature may amount indirectly not only to effective sanctions against the government, but against the population of a given state and, probably, the infringement on the part of the EU

We appear to be no nearer a considered understanding of the contribution of law to the values and the make-up of the institutional ethos of the EU or vice versa. In particular, no captivating philosophy for the Union or of its law has emerged. And, more importantly, no developed discourse or established institution-specific theory of substantive justice has been evident.' Williams, *The ethos of Europe : values, law and justice in the EU*, at 13-14.

⁵¹⁵ And, thus, not only human rights, but also principles of democracy and human rights.

of promoted and upheld values. This is a frequent criticism raised against international sanction regime, and as such, serves as the confirmation of the broader claim. Certainly, the international legal order as it currently stands, with traditional international legal instruments at its disposal is not capable of responding to calls manifested, *inter alia*, by critiques of the EU external human rights policy. This conclusion is to be reached even before considering the last part of the puzzle – the availability and accessibility of judicial review measures which in international realm is either null or limited to the fragmented and highly complex regimes.⁵¹⁶ Indeed, it seems that within the set limits – the external human rights policy of the European Union has reached the maximum level. Developing it more within internal sphere would amount to a *de facto* federalism; in external realm, it would mark a super-power acting according to the dictate of law (which in human rights realm is also a tool rather than a goal on its own⁵¹⁷) regardless of externalities it might produce.

Yet, the EU, as we have seen in the previous chapters, did not seize to look for alternative solutions and thus developed probably the most advanced toolbox there exists for the pursuit of human rights objectives in external policy and, therefore, at the intersection of the EU and international environment. The toolbox escapes the traditional legal analysis not because it is not based on legal rules, but because it corresponds to the changed architecture of international law and 'pierced' the veil of sovereignty of the state directly 'promoting and upholding' the rights of individual citizens of third countries with whom the EU maintains relations.

This signals, in line with the literature dominating the past fifteen years, the radical transformation of international legal regime. It is the departure from the logic in which problems had been tackled on the state level and through the institutions of international law and basing on State territoriality principle. In search of a better concept⁵¹⁸ giving us

⁵¹⁶ Out of which, surprisingly, the less complicated one was the European Union one. The openness of the Court to preliminary references became, indeed anecdotal with a court accepting any envelope with its sole name indicated thereon and a question of a referring court amounting to one phrase.

⁵¹⁷ Schmitt, *Der Nomos der Erde : im Völkerrecht des Jus Publicum Europaeum*, Carl Schmitt, *Le nomos de la terre dans le droit des gens du jus publicum europaeum* (Presses Universitaires de France 2001).

⁵¹⁸ See differences in the epistemological meaning of governance conception: Gunnar Folke Schuppert, *Governance-Forschung : Vergewisserung über Stand und Entwicklungslinien* (Nomos 2005); Arthur Benz, *Handbuch Governance : theoretische Grundlagen und empirische Anwendungsfelder* (1. Aufl. edn, VS Verlag für Sozialwissenschaften 2007) Arthur Benz, *Governance - Regieren in komplexen Regelsystemen : eine Einführung* (VS Verlag für Sozialwissenschaften 2004) Mark Bevir, *The SAGE handbook of governance* (SAGE 2011) Anne

criteria for evaluation, we need to speak of governance for it grasps what the purely legal analysis does not take into account, whilst paying dues to the function and procedural basis thereof. It is clear that the EU in its external policy readily applies governance principles – being flexible, they serve well the purposes of going beyond what law provides for. And the European Union goes well beyond giving flesh to what has developed from governance; what became known in the EU internal dealings as, first, new governance, and, later, reflexive governance, and, what with reference to the external sphere, in Gráinne de Búrca's term what has been adapted in the general external relations context as governance mode of external policy.

In doing so, the EU has probably expanded its role and put on the hat of the administrator – it legislated with the view of administering. Through the use of procedures, it creates frameworks within which the objectives can be achieved in a manner more adapted to the needs of a particular situation. The hat of the administrator that the EU partially puts on in the external relations forces us to consider, in addition to the new governance framework, that of global administrative law and the relationship between the two.

There is one more argument that speaks in favour of adopting the GAL and governance lens of analysis for the external human rights policy. The subject of the policy – human rights are particularly important for the international legal system. Universal, inalienable characteristics of all individuals across the world, human rights acquired the characteristics of public good which needs to be pursued with all means available. As such they correspond to the substantial focus of both governance and global administrative law, and contribute with yet another voice to the hitherto ongoing debates about the position of human rights against other areas of law (the most known being that between Petersmann and Alston concerning the WTO legal regime⁵¹⁹).

It needs to be noted that the GAL lens provides some additional dimensions to the two problems raised at the beginning of this chapter with relation to the rule of law paradigm.

Mette Kjær, *Governance* (Polity Press 2004) Karl-Heinz Ladeur, 'Theory of Governance' Max Planck Encyclopedia of International Public Law, online edition and others.

⁵¹⁹ See, for instance: Petersmann, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration', and subsequently: Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann'.

Firstly, if we assume that in some areas of its external policy the EU acts as an administrator and that human rights (also as public goods) constitute a subject of its actions leading to a creation of the instruments that are available, potentially, to the global community, then from this point of view the EU fits in the rule of law paradigm. We could state that the Global Administrative Law endorses new governance in a functional way – treating it as an instrument of pursuing global administrative law objectives. In this case, whilst maintaining the hitherto prevailing distinction between law and governance, it seems obvious that the governance paradigm of the international administration is complementary to the one of rule of law.

Secondly, the above conclusion leads us directly to Marc Dawson's proposal of the theory of new governance being internal to law⁵²⁰, thus marking the transformation of the European law. Consequently, in the European Union external legal context, there is a space for reshaping the rule of law concept including the neglected otherwise governance elements thereof. In very simplistic terms we could state that the work of the past 10 years focused on the developing new governance theory has finally brought us to its application as the additional legal benchmark; constituent of the European Union rule of law framework.

The case study of the European Union external human rights policy demonstrates – unlikely as it may seem given its substance – that there is a need to take the above mentioned change on board whenever evaluating the policies and legal frameworks devised by the Union for the pursuit of specific objectives. Simplifying for the illustrative purposes, there is no more room for objecting to the presence of the governance principles in the practice of the EU institutions; consequently academia needs to embrace this reality and develop tools enabling the comprehensive analysis and evaluation of the said frameworks. This chapter presents a proposal how this could be done.

The proposal to endorse governance principles as complementary to the rule of law ones will start off with placing the EU external human rights policy in the context of global administrative law framework. Having done so, it will be necessary to determine what is the relationship between the GAL and the governance approaches. Finally the focus will be placed on the new governance and its characteristics and benchmarks. The last part of this

⁵²⁰ Mark Dawson, 'New governance and the transformation of European law : coordinating EU social law and policy' (Published version of EUI PhD thesis, Cambridge University Press, 2011), at 92-101.

work will summarise the findings in order to propose a comprehensive tool for assessment of the external human rights policy of the European Union.

II. Governance

So far, what we have established is that there exist core components of the rule of law conception that could be useful in analysing and evaluating the external human rights policy of the European Union. The extracted benchmarks seem to be a ready solution for purposes of evaluation; however, as indicated above they do not give us the complete picture of the EU external human rights policy. The concept of governance and its derivatives should allow us to fill the gaps of the analysis, and complete the list of legal benchmarks according to which, ultimately, any policy dealing with public goods could be assessed.

This section serves the purpose of placing governance in the midst of our discussion and identification of threads of legal conceptions that may prove useful to elaborating those benchmarks. It will start with the identification of governance as the part of the legal research and the constituent part of any external human rights policy. The analysis will not focus on the governance initiatives undertaken within international organisations at stake.⁵²¹ The chapter will then move to identifying the most important threads in the legal analysis of governance and identify those, which in factual terms can be identified in the practice of the EU pursuing human rights objectives in external field, thus providing the starting point of discussion in subsequent sections.

Just as it is the case with the elusive concept of rule of law, there exist many definitions of governance.⁵²² Unlike the rule of law, governance is about the practice of exercising authority, not about the theory or ideal to be strived for. Traditionally contrasted with 'government', governance attempts to grasp everything that can be found underneath the formal structure of procedures and institutions interactions of which are provided for by law.⁵²³ Governance, at least according to its understanding in legal sciences⁵²⁴, bridges the

⁵²¹ For more on implementing good governance by international institutions for the purpose of guiding their internal affairs, see, for instance: Jan Wouters and Cedric Ryngaert, 'Good Governance: Lessons from International Organizations' in Deirdre M. Curtin and Ramses A. Wessel (eds), *Good Governance and the European Union* (Intersentia 2005), at 80-101.

⁵²² There is a wealth of literature (mainly that in the field of political science) analysing the term and notions of governance. For more on definitions and conceptions of 'governance' see for instance: Bevir Kjær

⁵²³ It is interesting to note that the Brandt Commission elaborated the vision of governance based on rights and responsibilities – rights that are to be ensured to all people as in classical setting, yet responsibilities resting on

two allowing for a much better understanding of power distribution and, therefore, for better regulation. This can be done only with highest attention given to translation of the concept from the area of political science to the legal science which has been done especially with reference to new governance in, what is described by Dawson, as a two wave process, with a growing need of the third wave of literature.⁵²⁵

The rise of the concept of governance is attributed, as explained by Ladeur, to the 'emergence of multiplicity of phenomena of cooperation beyond traditional forms of decision-making'⁵²⁶. These came about as the consequence of globalisation processes, facilitated exchanges of goods, services resulting, ultimately, in the increased 'level of complexity of knowledge-generation and stabilization, for use in the processes of decision-making' and 'a kind of "second order" proceduralization which structure the factual preconditions of conventions and political relations'⁵²⁷. Thus emerged the need of the regulation of this proceduralization which, alongside with issues regulated by them, would pierce 'sovereignty' and go beyond the logic of territoriality. The focus is placed on the

all the people for the purpose of governance emphasising the participation and accountability of all the actors of the process.

In the view of the Brandt's Commission, governance is a two sided process where in order to ensure to all the people certain set of standards and rights, the people need to take on some responsibilities. Amongst the rights the Commission enumerates 'a right of all people to: a secure life; equitable treatment; an opportunity to earn a fair living and provide for their own welfare; the definition and preservation of their differences through peaceful means; participation in governance at all levels; free and fair petition for redress of gross injustices; equal access to information; and equal access to the global commons.'

On the other hand, 'all the people share a responsibility to: contribute to the common good; consider the impact of their actions on the security and the welfare of others; promote equity, including gender equity, protect the interests of future generations by pursuing sustainable development and safeguarding the global commons; preserve humanity's cultural and intellectual heritage; be active participants in governance; and work to eliminate corruption.'

The democratic system, in the view of the drafters of the report offers the best venue for the new vision of governance to be put into life, given that the people take on the responsibilities and become active in the process. See: Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press 1995), at 336-337.

⁵²⁴ See, for instance the definitions coined by Weiss and Thakur according to which governance is 'the sum of laws, norms, policies, and institutions that define, constitute, and mediate relations among citizens, society, market and the state', whilst good governance 'incorporates people's participation and empowerment with respect to public policies, choices and offices; the rule of law and the judiciary to which the executive and legislative branches of the government are subject, as are citizens as are other actors and entities; and standards of probity and incorruptibility, transparency, accountability, and responsibility.' See: Thomas G. Weiss and Ramesh Thakur, *Global Governance and the UN - an Unfinished Journey* (Indiana University Press 2010), at 6.

Economics and political science conceptions – ADD REFERENCES.

⁵²⁵ Dawson, at 4-16.

⁵²⁶ Ladeur at para 5.

⁵²⁷ Ibid at para 5 and 6.

inclusion of knowledgeable actors in the procedures of norm creation and norm application – because they are in possession of knowledge and frequently remain the ultimate addressees of norms, but also because they are 'closer' to the object of policy according to the rules of subsidiarity.

Similarly, as it was mentioned in the introductory note to this chapter, the global factors, contributing to emergence of governance, have also affected the global legal order, opposing non-hierarchical model of decision making to the traditional conceptions of law. For, in the words of Slaughter '(i)n post-modernity the hierarchical mode of international coordination is severed by multiplicity of 'disaggregated' forms of cooperation at different levels'⁵²⁸. Thus, the global governance is yet again characterised by processes, as opposed to stable structures, connected with permeability of state 'borders' both in symbolic and literal sense⁵²⁹ and emergence of non-state actors on the international level. Their 'actorness' is disputed within the realm of international law, whilst, at the same time, indispensable for the use of governance. Ladeur thus comments on the phenomenon:

'Beyond traditional bi- and multi-national cooperation between States or of international organizations in traditional vein, a new arena has emerged which is populated by different versions of private-public networks and forms of decision-making which act beyond the clear attribution of responsibility to State actors. (...) Within traditional international organizations the new flexible forms come to the fore as well. This is true for the use of 'soft law' as an alternative to binding majority decisions as a 'half-way house' (Klabbers) allowing for compromise (Koskenniemi, Reinicke and Witte, 2009).'⁵³⁰

The new forms of international rule have been also complemented by the emergence of 'new sovereignty' of a state who becomes involved in the 'wide range of international and trans-governmental regimes, networks and institutions'⁵³¹. The emergence thus affected the core of international law and theoretical concepts underlying it, discussed also within the hard core of the discipline usually with reference to fragmentation of international law.⁵³²

It is important to remember that the objective behind the development of the conception is tightly connected with rise of private actors in the globalisation process. These private actors, whilst getting involved with the decision making processes, have also pursued their

⁵²⁸ Anne-Marie Slaughter, *A new world order* (Princeton University Press 2004), as cited in: Ladeur at para 13.

⁵²⁹ Slaughter.

⁵³⁰ Ladeur at para 14.

⁵³¹ Chayes and Handler, op. cit.

⁵³² United Nations. International Law Commission. Study Group., Koskenniemi and Erik Castrén -instituutti.

own interest with an ultimate view of making profit. On the other hand, public authorities, belonging to the sphere of government, have welcomed this rise aware that in the complex global setting, regulation very often requires high levels of expert knowledge, usually in possession of industries at stake.

Human rights, as an objective of governance, do not fit the profit-oriented picture. The same problems as described in previous chapters arise. Human rights are both the base – underlying value – of actions and their objective. Yet, even here, private actors have emerged interested in the pursuit of the objectives and in possession of the knowledge to do so. The non-governmental organisations involved in the process of human rights objectives pursuit, do so also following their own interest, with the 'expert knowledge' of the field situation; capable of piercing 'sovereignty' veil without putting the financing actor – be it a state, international organisation or a private entity – at risk of infringing one of the principles of the international legal context – sovereignty. It needs to be noted that the pursuit of human rights objectives in such a mode follows the hypothesis of Renate Mayntz for the economic sectors⁵³³ according to which regulation takes the turn to governance in conditions of uncertainty of the status of the subject and object of regulation. In human rights arena, the ultimate subjects whom the principle affects do not necessarily welcome the standard; which in itself, though universally accepted, varies depending on the culture of the state we are considering.

Therefore, the governance logic remains behind the design of procedures and instruments, which are to meet policy objectives. We can speak of new governance – which emerged within the international cooperation context between the member states in the area of social policy of the member states – that has found its application also in the general context of external policy, with human rights objectives being an example of how the traditional legal measures are rendered inefficient. This new governance can be perceived as accompanied by the transnational administrative institutions, or institutions which perform functions of transnational administrative institutions. These issues shall be addressed in the subsequent part of the chapter.

⁵³³ See *inter alia*: Renate Mayntz and Max-Planck-Institut für Gesellschaftsforschung., *The architecture of multi-level governance of economic sectors* (MPIfG 2007).

Before doing so, however, we shall address the manner in which international organisations have embraced the governance paradigm in order to determine what in their view constitutes governance. They have, therefore, regulated the standards of new governance which have been created as benchmarks by international organisations, though in their history and origins reach the ancient times, and in fact distract the picture of the emerging governance forms by linking them to the previously existing and well developed concepts thus creating a chapeau over the known legal and administrative architecture of the intra- and inter-state dealings. The following section provides an insight into this attempts.

What makes Good Governance? International organisations' perspectives.

The concept of governance in its contemporary form has been developed in contrast to the prevailing state-centred concepts of 'government' and international law. It needs to be distinguished from the normative concept of 'governance' that had been used to comment and evaluate the practice of exercising authority for more than 2500 years.⁵³⁴ The contemporary understanding of the term has been coined by the Commission on Global Governance, known as the Brandt Commission and was described as the collective of ways in which public and private institutions and individuals manage their common affairs. Governance includes both formal institutions and regimes which are to enforce rules as well as informal arrangements in which people and institutions participate because they perceive it to be in their interest or they agreed to do so.⁵³⁵ Later on, with development of indicators, the term shifted to its 'normative' understanding, used in the international context it has given the authority of stronger actors (usually donor countries) to evaluate 'achievements' of recipient countries. The term, in its normative dimension differs hugely from the above outlined description of the international practice and *de facto* transformative processes taking place on the international level. It is well grounded in the inter-state practices and focused on the fulfilment of governance conditions by the third countries. As such, it does not reflect the multiplicity of actors; nor does it place focus on the processes. It rather corresponds to the demands placed by the stronger actors and international community represented by the United Nations and the World Bank towards states that are weak in

⁵³⁴ Daniel Kaufmann and Aart Kraay, 'Governance indicators : where are we, where should we be going ?' 23 The World Bank Research Observer 1at 3.

⁵³⁵ Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press 1995), at 2.

political and economic terms and from this point of view corresponds to rule of law benchmarks identified in Chapter 2. It is important to note, though, that the process of external evaluation has also turned the lens to the organisations themselves who in recent years have started to develop their internal governance standards.

For the purposes of the present analysis, both of the governance standards determined with reference to the external and internal dealings of organisations are useful for they shed light on what is regarded in international sphere as a proper management of common affairs. They will allow us to enrich the standard of review benchmarks used in the context of the EU external human rights policy.

The Brandt's Commission not only defined the governance – it also determined the areas which are of interest from the point of view global community security, economic interdependence, the United Nations, and the rule of law. It underlined the multitude of actors present on the global governance arena: states, international organisations, NGOs, citizens' movements, transnational corporations, academia, and the mass media.⁵³⁶ Given the thus changed landscape international arena, the Commission underlined the need for 'a new vision, challenging people as well as governments to realize that there is no alternative to working together'⁵³⁷.

It is interesting to note what was the Commission's on Global Governance stance on the importance of the use of rule of law concept in international context:

'The rule of law has been a critical civilising influence in every free society. It distinguishes democratic from a tyrannical society; it secures liberty and justice against repression; it elevates equality above dominion; it empowers the weak against the unjust claims of the strong. Its restraints, no less the moral precepts it asserts, are essential to the well-being of the society. Both collectively and to individuals within it. Respect for the rule of law is thus a basic neighbourhood value. And the one that is certainly needed in the emerging global neighbourhood.'⁵³⁸

⁵³⁶ Ibid, at 335.

⁵³⁷ Ibid, at 336.

⁵³⁸ Governance, *Our Global Neighbourhood*, at 303.

Following this assertion the Commission pointed to two major areas that it considered essential for the improvement of the global rule of law standard: strengthening of international law⁵³⁹ and facilitating the legislative process on international level.

The UN specialised agencies took on the concept of governance and have been using it ever since defining what they consider as good governance on case-by-case basis and therefore depending on the area. The UN widely uses term coined and promoted by Kofi Annan 'democratic governance'; perceived as the blend of tools associated with democracy and governance, addressed at the people and used to empower them. It is invoked in many official documents⁵⁴⁰, yet its meaning has not been elaborated, save for the efforts on the part of the United Nations Development Programme. The latter entered into the Partnership on Democratic Governance with the Organisation for Economic Co-operation and Development which concluded its mandate in October 2011.⁵⁴¹ Neither can one find there a comprehensive definition of what makes good democratic governance.

Nevertheless, despite the lack of the UN formal documents concerning good governance, the literature offers the useful tool of filling in making up for this lack. John Ruggie, acting in his capacity as a Special Rapporteur for the Secretary General on the Framework for Business and Human Rights pointed to 'governance gaps' as the source of the predicament between business and human rights.

'These governance gaps provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation. How to narrow and ultimately bridge the gaps in relation to human rights is our fundamental challenge.'⁵⁴²

⁵³⁹ Through introducing compulsory jurisdiction of the ICJ and reforming it as well as ensuring compliance and effectively reforming the Security Council.

⁵⁴⁰ For instance: United Nations Democracy Fund points to good governance as the part of the guiding principles for effective assistance and evokes democratic governance.

See: United Nations Democracy Fund, 'Guidance Note of the Secretary-General on Democracy' <http://www.un.org/democracyfund/About_Us/UNSG%20Guidance%20Note%20on%20Democracy.pdf> .

⁵⁴¹ OECD, 'Partnership for Democratic Governance' <http://www.oecd.org/pages/0,3417,en_39406396_39406575_1_1_1_1_1,00.html>

⁵⁴² John Gerard Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (United Nations 2008) at 3, para 3. The categorisation of governance gaps has been later on used by Weiss and Thakur in the study of the United Nations History Project: Weiss and Thakur, op. cit.

The gap approaches provides a useful analytical tool of understanding which aspects should be taken into consideration for the governance to be defined.⁵⁴³ There have been five gaps which were identified. The knowledge gap concerns the nature, seriousness or the size of the problem – both empirical knowledge and theoretical explanations. This gap is filled in by universities, research institutions, think tanks, NGOs and stake holders. It is about identifying problems and defining them. Normative gap concerns the establishment of universally accepted norms and the way it can be done. It also concerns the possible penetration of an internationally, universally accepted norm into the local system of laws.⁵⁴⁴ Policy gap concerns existing policy, that is: ‘an interlinked set of governing principles and goals and the agreed programs of action to implement those principles and achieve those goals’⁵⁴⁵. There are two problems associated with filling in policy gap: the identification of relevant policy makers and the lack of connection between various, increasing number of actors on national and the concentration of decision making power in international organisations. The fourth is the institutional gap starting from an assumption that if the policy is not to be regarded as *ad hoc*, or arbitrary, it needs to be based on permanently existing institutions. The final gap is the compliance gap which involves mechanisms allowing for identification of deviations from universally accepted norms as well as incentives for successful cooperation and punitive measures should the cooperation not follow the standard.⁵⁴⁶ Obviously, the filling in of the governance gaps requires consideration of both political scientific categories as well as legal ones, nevertheless, this approach orders the analysis which can be undertaken in relation to the good governance. Following the analytical tool of governance gaps leads us to a conclusion that good governance that these gaps are filled in, if not sealed, yet in accordance to the need determined on the basis of the knowledge gathered in the process of knowledge gap pasting.

⁵⁴³ Weiss and Thakur, at 7-23.

⁵⁴⁴ As Weiss and Thakur indicate ‘(w)e still do not have adequate conceptual tools and enough empirical research for a theory of how international norms emerge, diffuse globally, consolidate to the point of being internalized by members of international society, and embed themselves in international institutions. Nor is there an agreement on who can legitimately claim to articulate or pinpoint ‘global’ norms.’ They also recall the work of Martha Finnemore and Kathryn Sikkink and the three stage life cycle of norms (1. ‘a new norm emerges and a norm entrepreneur advocates it’; 2. ‘enough actors agree on an emerging norm to create a tipping point, or norm cascade’; 3. ‘actors internalize the new norm so that it becomes taken for granted and norm-conforming behaviour becomes routine requiring no further justification’. See: Martha Finnemore and Kathryn Sikkink, ‘International Norm Dynamics and Political Change’ 52 International Organization 887 in: Weiss and Thakur, at 11.

⁵⁴⁵ Weiss and Thakur, at 12.

⁵⁴⁶ Weiss and Thakur assumed in their analysis division between implementation, monitoring and enforcement.

Whilst the UN remains silent about what it as an organisation understands as good governance, it relies heavily on the concept developed by the World Bank. The most globally influential indicators have been produced as the result of the research of the World Bank Institute for the purposes of the Worldwide Governance Indicators.⁵⁴⁷ The governance, within the project was defined as 'traditions and institutions by which authority in a country is exercised'⁵⁴⁸. The normative aspects of the indicators, as opposed to those pushed for by the International Monetary Fund⁵⁴⁹ which are focused on good economic governance, include in addition to economic issues, political and social ones. Six indicators are named: voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law, and control of corruption. The underlying idea is to demonstrate that good governance is essential for achievement of economic growth. Fulfilment of those indicators constitute a good governance practice.

On the European level, the Council of Europe repeats the UN commitment to the good democratic governance pursued chiefly on regional and local level. The Strategy for Innovation and Good Governance at Local Level has been launched as the result of October 2007 Conference of European Ministers Responsible for Local and Regional Government.⁵⁵⁰ The Strategy foresees establishment of the platform which would enable the exchange of experience and ultimately lead to granting the European Label of Governance Excellence based on the 12 European principles of the good democratic governance. The twelve principles involve: (1) fair conduct of elections, participation, representation⁵⁵¹;

⁵⁴⁷ See, for instance, the Governance website of the UN: <http://www.un.org/en/globalissues/governance/links.shtml>, as well as the references to the World Bank Institute blog devoted to the governance and anti-corruption: <http://blogs.worldbank.org/governance/blog>.

⁵⁴⁸ Governance Matters 2006 - Worldwide Governance Indicators, *A Decade of Measuring the Quality of Governance* (The International Bank for Reconstruction and Development / The World Bank 2006)

⁵⁴⁹ International Monetary Fund Executive Board, *Good Governance. The IMF's Role. Guidance Note*. (IMF 1997), at v-vi.

⁵⁵⁰ Conference of European Ministers Responsible for Local and Regional Government, 'Valencia Declaration on 'Good Local and Regional Governance - the European challenge', MCL-15 (2007) 5 final' (October 2007) <<https://wcd.coe.int/com.intranet.InstraServlet?command=com.intranet.CmdBlobGet&IntranetImage=1095949&SecMode=1&DocId=1350476&Usage=2>> The latest report on the implementation of the strategy was published in February 2011: Stake Holders' Platform, 'State of Implementation of the Strategy for Innovation and Good Governance SIGG(2010)5 11 February 2011' <[https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG\(2010\)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG(2010)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679)>

⁵⁵¹ The principle of Fair Conduct of Elections, Representation and Participation involves that local elections are conducted freely and fairly on the basis of the citizens' activity and participation, which takes place on equal basis. The possible conflicts are to be mediated and the decisions are to be taken by the majority.

(2) responsiveness⁵⁵²; (3) efficiency and effectiveness⁵⁵³; (4) openness and transparency⁵⁵⁴; (5) rule of law⁵⁵⁵; (6) ethical conduct⁵⁵⁶; (7) competence and capacity⁵⁵⁷; (8) innovation and openness to change⁵⁵⁸; (9) sustainability and long term orientation; (10) sound financial management; (11) human rights, cultural diversity and social cohesion⁵⁵⁹; (12) accountability⁵⁶⁰. The Twelve Principles constitute one of three pillars of the Strategy which is based on individual local authorities (municipalities, communes) and centrally agreed Action Plans. The Strategy is supervised by the Stake Holders' Platform. The strategy is in the process of implementation, yet the CoE twelve principles of European governance provide a very good example of the approach to what the governance approach may mean – and the way in which it can be directed inwardly – towards the organisation.

The Organisation for Security and Cooperation in Europe and the Organisation for the Economic Cooperation and Development have devoted some of their activities in governance oriented activities. The OSCE has been focusing especially on institution building in post-conflict societies, yet it does not define the term for its own purposes, seeing it as emanation of rule of law.⁵⁶¹

⁵⁵² The principle of Responsiveness assumes that the authorities are to respond to any claims of citizens within a reasonable time; whilst the framework of actions undertaken by them is to be adjusted to the legitimate expectations and actual needs.

⁵⁵³ The principle of Efficiency and Effectiveness requires that results meet objectives whilst the resources are being made use of in the best possible way. The activities are to be undertaken under the appropriate scrutiny (evaluation, audits).

⁵⁵⁴ The principle of Openness and Transparency provides for decisions to be made according to existing and accessible rules and regulations; public access to information; and the information is supplied in such a way as to enable the society to effectively participate in the decision making.

⁵⁵⁵ Rule of Law principle is straightforward – it requires that local authorities abide by the law and judicial decisions and that the decisions are made according to existing rules and regulations and enforced impartially.

⁵⁵⁶ The principle of Ethical Conduct requires that public good is placed before the individual interests, that corruption is combated in an effective manner, and that conflicts of interests are avoided by persons involved withdrawing in a timely manner.

⁵⁵⁷ Competence and Capacity requires that professional skills of those who deliver governance are continuously maintained at the highest of levels, there are incentives and creative methods and procedures are employed.

⁵⁵⁸ Principle of Innovation and Openness to Change assumes that new solutions for existing problems are thought and that there is readiness to experiment.

⁵⁵⁹ Principle 'Human rights, Cultural Diversity and Social Cohesion' requires that there is an active commitment to human rights as well as to cultural diversity (that is to be regarded as an asset) and social cohesion.

⁵⁶⁰ Decisions made are reported and explained; all decisions makers take responsibility. At the same time there are effective measures against maladministration.

⁵⁶¹ Organisation for Security and Cooperation in Europe, *European Security Charter* (OSCE 1999), at no. 33.

The OECD, in contrast used to focus on corruption, perceiving its presence as the biggest threat to governance.⁵⁶² In the past five years, however, has enhanced its good governance file and elaborated clear principles of good governance that guide its actions:

‘Accountability: government is able and willing to show the extent to which its actions and decisions are consistent with clearly-defined and agreed-upon objectives.

Transparency: government actions, decisions and decision-making processes are open to an appropriate level of scrutiny by others parts of government, civil society and, in some instances, outside institutions and governments.

Efficiency and effectiveness: government strives to produce quality public outputs, including services delivered to citizens, at the best cost, and ensures that outputs meet the original intentions of policymakers.

Responsiveness: government has the capacity and flexibility to respond rapidly to societal changes, takes into account the expectations of civil society in identifying the general public interest, and is willing to critically re-examine the role of government.

Forward vision: government is able to anticipate future problems and issues based on current data and trends and develop policies that take into account future costs and anticipated changes (e.g. demographic, economic, environmental, etc.).

Rule of law: government enforces equally transparent laws, regulations and codes⁵⁶³

Since 2007 the Directorate for Public Governance and Territorial Development has been working in two areas (under two committees). The Committee for Territorial Development deals with regional policy. The Public Governance Committee has been focusing on public governance drawing country reviews.⁵⁶⁴ In addition to the above, the data set based on indicators of good government are published annually.⁵⁶⁵

⁵⁶² Wouters and Ryngaert, at: 76-77.

⁵⁶³ OECD, Directorate for Public Governance and Territorial Development website, Principles of Good Governance: http://www.oecd.org/document/32/0,3746,en_2649_33735_1814560_1_1_1_1,00.html. Interestingly, the OECD uses also the concept of bridging gaps in its methodologies – it refers to information, capacity, administrative, policy, and funding gaps. See: <http://www.oecd.org/dataoecd/8/9/47622832.pdf>.

⁵⁶⁴ So far the following countries have been analysed using the OECD public governance methodology: France, Ireland, Finland, Estonia, Greece, and Slovenia, Poland, will have its report published in the course of 2012 as

In the European Union context the term ‘good governance’ appeared for the first time in 1991 in the Resolution on human rights, democracy and development, ever since that time the triad of ideals has been evoked in the development policy context. For recollection, the recent, October 2011 Communication of the Commission on the ‘Increasing the impact of EU Development Policy: an Agenda for Change’⁵⁶⁶ described human rights, rule of law and democracy as the elements which are to be promoted in the course of the work undertaken by the European Commission (DG Development) in the area of development aid with no further reference made to the general meaning of governance.

In fact, the substantive discussion as to what ‘governance’ is to mean in the context of European Union activities has not taken on until later. It was initiated in 2001 with the delivery by the European Commission of the White Paper on Governance⁵⁶⁷. The White Paper attracted a lot of attention from wider public including NGOs and academic community.⁵⁶⁸ Its content was contested, yet what probably gives more food for thought is the lack of reference therein to governance as the legal concept, therefore, curbing White Paper’s impact assessment amongst the legal community. What is striking is the Commission’s will to redefine the notion of governance in order to suit its own objectives, but also the vision of decision making process. According to the White Paper ‘Governance means rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence’⁵⁶⁹ This is the broader context of the reform of the beginning of the reform of the governance in the European Union, the reform, that subsequently focalised itself on the better regulation initiatives and introduction of a ‘relational and collaborative’ mode of governance characterised by existence of many fora where diverse stakeholders could consult with the Commission in the course of the decision making process. The better

well as the second report on Greece. See: http://www.oecd.org/document/28/0,3746,en_2649_37405_45625948_1_1_1_37405,00.html.

⁵⁶⁵ http://www.oecd.org/document/12/0,3746,en_2649_33735_37688524_1_1_1_1,00.html

⁵⁶⁶ Commission, ‘Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions ‘Increasing the impact of EU Development Policy: an Agenda for Change’ COM(2011) 637 final’, at 5.

⁵⁶⁷ European Governance, A White Paper COM(2001) 428 final.

⁵⁶⁸ Curtin M. Deirdre and Ige Dekker, ‘Good Governance: the Concept and its Application by the European Union’ in Ramses A. Wessel and Curtin M. Deirdre (eds), *Good Governance and the European Union* (Intersentia 2005), see at p 4 and fn 4.

⁵⁶⁹ European Governance, A White Paper COM(2001) 428 final, at 8, fn 1.

regulation has taken off with 2002 initiatives of the Commission comprising with guidelines as to how to legislate⁵⁷⁰, taken on board by other European institutions in the form of the 2003 Inter-Institutional Agreement on Better Law-Making⁵⁷¹. As of this point the discussion of the governance has taken the turn to regulation instead of governance; ultimately focusing on simplified, and in recent years, better regulation. The focus of the initiatives undertaken as off then has been based on three concerns – simplification of the EU *acquis*, closer collaboration with the Member States in order to ensure the observance of the better regulation principles, and enabling stakeholders to participate in the decision making procedure throughout the process. The In practice of the European Commission's activities those three focuses translate in the number of files that are subsequently elaborated in the cross-cutting initiatives which have been undertaken since the 2001 White Governance Paper. These comprise of: impact assessment, consultation, expertise, administrative costs (or reduction thereof), choice of regulatory instruments, transposition and application of EU law, simplification, codification and recasting, accessibility and presentation of EU law, evaluation, inter-institutional coordination, and Member States' action. Interestingly, these focal points to a large degree reflect what is regarded in the general view, reflected by the benchmarks extracted for the purpose of this study, as rule of law concerns. Yet, in the European context those concerns refer to the two-level relationship – between the European institutions and citizens and citizens organisations, and between the European institutions and Member States. This approach refers, therefore, more to the issues associated with accountability of the EU before the two groups of actors. As such, they cover only some of the facets of what governance is about, even for the European Commission itself, in the light of its own findings represented by the White Paper on Governance.⁵⁷² Obviously, each of the focal points refers in an indirect manner to what we intuitively understand as governance, yet it does so from the perspective of the Commission and for the purposes it has defined.

The third strategic review of the Better Regulation initiative confirms its statement. The focus is yet again on the more transparent presentation of results; impact assessment of

⁵⁷⁰ European Commission, *Communication from the Commission - European Governance: Better lawmaking. COM (2002)275 final* (5 June 2002).

⁵⁷¹ Council European Parliament, Commission, *Inter-Institutional Agreement on Better Law-making* (OJ 2003 C321/1).

⁵⁷² European Governance, A White Paper COM(2001) 428 final.

legislative acts with the focus on issues such as ‘SME test’, fundamental rights, consumer health, impact on the local and regional levels, provision of the evidence and quantitative analysis; analysis of subsidiarity principle (therefore, justification of adoption of specific regulatory measures). On the top of this ‘Commission watches its back’ approach there is a little statement concerning the Commission’s Minimum Standards for Consultations confirming the Commission’s strivings for full implementation thereof.⁵⁷³ Subsequent initiative undertaken by the Commission reflects the earlier, self-focused one sided governance approach undertaken by the European Commission. The Better Regulation has apparently evolved to Smart Regulation⁵⁷⁴ and the Communication referring to this development is a voice of the Commission in the inter-institutional dialogue fuelled by the European Parliament Report and the Report of the Court of Auditors.⁵⁷⁵ Smart regulation does not essentially change what Better Regulation was – it is rather a summary of achievements of the latter and experiences gathered through the experimentation phase of the preceding eight years. We might refer to it as codification of the rule of law processes underlying the European policy making (since it is to encompass all of the European policy making process), which is, however, an underestimation. Whilst the regulation approach might substantially reduce what governance is, the characteristics of the associated process gives a slightly different impression. We are speaking here of the institutions inter-acting between one another, Member States, and the civil society in the course of what we may call self-reflexive process. This process is based on experimentation and constant improvement of practices – it is a prolonged inter-active discursive process. It is characterised by stages (marked by the adoption of communications by the European Commission) of codification of practices and marking the way to their improvement. Such governance practice is different from what is expected of governance approaches developed by various others international organisations (as demonstrated above) and constitutes, as

⁵⁷³ ‘Commission departments are encouraged to go beyond the 8 week minimum consultation period; further efforts will be made to ensure that all stakeholders are aware and able to contribute to consultations; clearer feedback should be provided in impact assessments on what information was requested from stakeholders, what was received, and how it was used.’ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions ‘Third strategic review of Better Regulation in the European Union’* (COM(2009) 15 final), at 7.

⁵⁷⁴ European Commission, *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions ‘Smart Regulation in the European Union’* (COM(2010) 543 final).

⁵⁷⁵ *Ibid*, at 2.

observed by scholars, 'a new governance'. The following section will present the essential characteristics of new governance as developed by the literature and shed light on why this approach is more prone to serve as analytical and evaluative lens for the EU external human rights policy.

III. New Governance, Reflexive Governance and Democratic Experimentalism

Unsurprising as it may sound, new governance was not distinguished from other form of governance predominantly in opposition to the 'old' type of governance where usual governmental approaches prevail as well as reliance on standard (hard) legal instruments.⁵⁷⁶ In this context 'new' referred to new approaches to governance as undertaken in the practice of the European Union and the United States. The term 'new governance' initially, in the collected publication⁵⁷⁷ edited by Gráinne de Búrca and Joanne Scott, was defined as 'a range of processes and practices that have a normative dimension but do not operate primarily or at all through the formal mechanism of traditional command-and-control-type legal institutions'⁵⁷⁸. Such definition emphasizes both the focus of the explored term (decision making *sensu largo*) as well as the relationship between the command-and-control formal order and the informal one.

The thus emerged debate on new governance has been ongoing for almost twenty years now and produced a fair amount of contributions of theoretical as well as applied, concrete case-study nature. Mark Dawson in his account of the rise of new governance⁵⁷⁹ identifies three waves of literature.

The first one was about describing new governance and its relationship to the traditional forms of exercising authority. The above quoted, cautiously and objectively coined definition of the area coined by Gráinne de Búrca and Joanne Scott comes from this first wave of literature – predominantly interested in the identification of the characteristics of new governance as well as of the base relationships' features of new governance in relation to law and constitutionalism.⁵⁸⁰

⁵⁷⁶ This approach had a number of shortcomings subsequently emphasised by both de Búrca and Scott as well as other contributors to the volume. See, for instance: G. De Búrca and Joanne Scott, 'Introduction: New Governance, Law and Constitutionalism' in G. De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006), at 3 as well as: Neil Walker, 'EU Constitutionalism and New Governance' in G. De Búrca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (Hart 2006), at 15.

⁵⁷⁷ Although not the first one dedicated to the subject. Initial publications concerning new governance go back to the early 1990s (see, for instance:), yet the true beginning of the first wave of academic literature which built on the earlier academic contributions started only after the European Commission issued the 2001 White Paper on Governance.

⁵⁷⁸ De Búrca and Scott, 'Introduction: New Governance, Law and Constitutionalism', at 2.

⁵⁷⁹ Dawson, Introduction, at 1-14 and: Mark Dawson, 'Three waves of new governance in the European Union' 36 *European Law Review* 208.

⁵⁸⁰ De Búrca and Scott, 'Introduction: New Governance, Law and Constitutionalism', at 1.

The second wave of literature named by Dawson⁵⁸¹ is about consolidation and determination of common characteristics of new governance processes whilst developing normative criteria as to what may be considered experimental, and what constitutes a kind of governance which can be referred to as reflexive. In doing so, the second wave of literature departed from law v governance juxtaposition, and moved to the analysis of the consequences of placing governance in the place of law. (Scott, Armstrong, Zeitel, Simon etc).

The final third wave of literature is a critical one. It builds on the previous two and attempts at overcoming the limits by incorporating new governance into the framework of law. Based on empirical analysis of the new governance method – especially of the Open Method for Coordination – it focuses on overcoming them by including the method within the framework of law.

Nevertheless, against the background of three identified waves of literature, there exists little consensus as to the definition of new governance. This in part is connected with the lack of the consensus over the notion of governance itself.⁵⁸²

As we can see, the academic discussion⁵⁸³ on new governance has been focusing mainly either on characteristic features of new governance and the relationship between governance and government paradigm. Both of the issues are important for this analysis – the former provides us with benchmarks; the latter is of interest for policy evaluation. I shall deal with them in turn.

1. New Governance Benchmarks

The characteristics of the new governance can be taken especially from the first wave of literature identified by Marc Dawson. The definition has been subsequently expanded through theories of experimentation and self-reflexivity.

⁵⁸¹ Dawson, *ibid.*

⁵⁸² Udo (lead coordinator) Diedrichs, 'Overview Paper on Classification and Mapping of Governance Modes (ref. no 1/D08)' NewGov New Modes of Governance Project, at 3.

⁵⁸³ Unlike the political one which is very limited in this respect and focuses mainly on actual procedures, taking the theoretical foundations of new governance selectively and using the ethos in a declaratory form.

De Burca and Scott initially thus describe (in a very cautious manner) the features of new governance, contrasting them with the characteristics attributed to the government mode of exercising authority⁵⁸⁴:

‘(...) the idea of new or experimental governance approaches places considerable emphasis upon the accommodation and promotion of diversity, on the importance of provisionality and revisability – in terms of both problem definition and anticipated solutions – and on the goal of policy learning. New governance processes generally encourage or involve the participation of affected actors (stakeholders) rather than merely representative actors, and emphasize transparency (openness as a means of information-sharing and learning), as well as ongoing evaluation and review. Rather than operating through a hierarchical structure of governmental authority, the ‘centre’ (of a network, a regime or other governance arrangement) may be charged with facilitating the emergence of the governance infrastructure, and with ensuring coordination and exchange as between constituent parts. A further characteristic often present in new governance processes is the voluntary or non-binding nature of the norms.’⁵⁸⁵

The definition and focal points of the concept of governance have been further analyzed in the above-described waves of literature, yet this discussion goes beyond the scope of the purposes of this chapter. The objective here is to determine what would it mean for the policy to follow governance paradigm as defined through the ‘new’ approaches and for this purposes the above definition is sufficient as a starting point.

Therefore, the experimental – new – governance is characterized by (a) the emphasis on provisionality and revisability connected with the accommodation of various needs, and promotion of diversity; (b) participation instead of representation; (c) transparency; (d) evaluation and review; (e) central/horizontal structure of exercising authority; (f) voluntariness and/or non-bindingness of norms. The above characteristic features have gained on substance as the result of intense and far-reaching governance studies as well as under the influence of theories of democratic experimentalism and reflexive democracy. The latter have complemented the first of the above listed elements with the emphasis on (g) learning.

⁵⁸⁴ Walker, ‘EU Constitutionalism and New Governance’, at 21-22.

⁵⁸⁵ De Búrca and Scott, ‘Introduction: New Governance, Law and Constitutionalism’, at 3. The definition and features of ‘new’ governance have been widely discussed in literature and conceptualised in numerous ways. See for instance: Oliver Treib, Holger Baehr and Gerda Falkner, ‘Modes of Governance: a Note Towards Conceptual Clarification’ N-05-02 European Governance Papers.

In the subsequent part of this section each of the characteristic features of new approaches to governance will be presented.

Provisionality and revisability of tools;

Framework making and revision are the distinct features of EU governance⁵⁸⁶. They are to respond to differentiated and altering needs as well as gaps in knowledge which become filled as time goes by. In internal Union dealings ensuring revisability take form of framework directives⁵⁸⁷, open method of coordination as well as strategies such as the cross-cutting Lisbon Strategy adopted in 2000 and reviewed in 2005.

In external policy contexts, instruments with reference to which there exists common agreement about their new governance characteristics include accession preparation tools (although sanctioned through hard law conditionality) and action plans used for the benefit of European Neighbourhood Policy.

Participation

New approaches to governance require participation of actors affected in every stage of rule-making and rule-enforcement. Participation substitutes representation required for democratic regimes and as such is heavily criticised as giving voice only to stakeholders instead of to the society as such.

Instruments of participation in internal policies of the Union include: on decision making level: consultations, open method for coordination; on implementation level: information exchange platforms, reviewing and reporting activities.

In external dealings participation on the level of decision making is limited to states involved in negotiations of international agreements and NGOs lobbying in the course of decision making processes.⁵⁸⁸ However, the recent reform of financial instruments have provided for

⁵⁸⁶ Charles F. Sabel and Jonathan Zeitlin, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union' EUROGOV Papers, No C-07-02

⁵⁸⁷ See, for instance: Directive 2000/60/EC of the European Parliament and of the Council establishing a framework for the Community action in the field of water policy.

⁵⁸⁸ Stijn Smismans, 'New Modes of Governance and the Participatory Myth' European Governance Papers (EUROGOV) No N-06-01 <<http://www.eu-newgov.org/>>

obligation of the Commission to give due attention to the voices of the civil society actors in the process of implementation of these instruments.⁵⁸⁹

Transparency

Transparency assumes open access to information at every stage of decision making and implementation. It comprises therefore information about the intentions and strategies of European institutions (hence publication of White Papers, consultation processes etc.), access to documents issued in the course of the process, as well as information on implementation process and timeline. Reports as well as peer review outcomes are also to be available to the public and allow for participation of stakeholders. Transparency is a *sine qua non* condition for both participation, evaluation and review as well as revision to take place. In addition to the above without access to information and knowledge, learning process could not take place.

Evaluation and Review

Evaluation and review of undertaken measures fulfils two-fold function in the governance system. Firstly, it provides information and knowledge indispensable for conducting revising activities. Secondly, evaluation and review in governance paradigm fulfils the same function as accountability mechanisms prevailing in traditional legal contexts.

Centric governance structure developed in horizontal manner

The governance structure foresees such a system of interactions between different stakeholders in which the 'centre' coordinates various stakeholders involved in the processes. The structure of power distribution is horizontal; it does not correspond the command-and-control and hence top-down and bottom-up arrangements.

Voluntariness/Non-bindingness of norms/Soft law

Voluntariness in new governance paradigm concerns above all voluntariness to participate fit in the framework of 'non-legislative or marginally legislative character'⁵⁹⁰.

⁵⁸⁹ See: EIDHR, Article 15.

⁵⁹⁰ Walker, 'EU Constitutionalism and New Governance', at 22.

The non-legislative or marginally legislative character of provisions is occasionally described as 'soft', sanction-less law. Lack of penalty does not induce compliance; instead compliance is induced through participation and peer review.

In the EU human rights sphere we can speak of at least two types of voluntariness - first one refers to the unilateral instruments that are either put at the disposal of the public (see Chapter 4 for examples), or instruments from which specific eligible entities can profit if they wish to, subject to conditions specified in such instruments (see Chapter 5, GSP+, EIDHR or Instrument for Peace and Stability).

Learning

The final element of new governance structure lies in the inherent learning processes that involves all stakeholders. Learning is the result of review and evaluation; it comes from participation and transparency. The fact that in new governance process learning is facilitated and encouraged, makes it necessary for flexible and revisable rules to exist. Learning allows for filling information gap about the existing problems, and available means for finding solutions for them.

Here, in the EU external relations realm the EU makes a big effort issuing reports for the totality of its external policy annually, reviewing specific measures, or producing the policy background documents in the form of communications with participation of civil society both within and outside of the EU.

2. New Governance and EU Internal Human Rights Policy

The new modes of governance have been analysed extensively within the context of the EU legal system. In particular, the impact thereof has been noted by the literature dealing with the internal human rights policy. The approach presented by the authors is of importance for the benchmarking activity as it points to the aspects that are searched for in the particular area of fundamental rights policy whilst at the same time offering the insight into how the governance and government modes can be interconnected (both practically and doctrinally).

Probably, the best account of the new governance techniques employed in the area of EU fundamental rights policy was offered by Olivier de Schutter who termed them 'the learning-

based fundamental rights policy for the European Union'.⁵⁹¹ His contribution is based on the premise that the non-judicial and non-legislative enforcement mechanisms need to be put into place in order to allow both the protection of fundamental rights by the EU Member States as well as to create the conditions for the effective functioning of the EU economic freedoms. In stating this, de Schutter does not contest the need to harmonise fundamental rights with legislative tools, yet claims that this may be, for various reasons, insufficient – or, in his words – either too ambitious or too modest.

'(R)eliance on the tool of legislation may be both too ambitious and too modest. Harmonization may be in any cases politically unrealistic to achieve. It may presume too much about our ability to identify how best to implement fundamental rights. The required legal bases may be missing. And we have currently no mechanism allowing us to identify, on a more or less systematic basis, the need for the Union to take action in this field.'⁵⁹²

De Schutter emphasises that only with the governance approach can the fundamental rights area grow into the full-fledged policy.⁵⁹³ In this approach he underlines the situation of insecurity and inadequacy of knowledge about the problem and the learning aspect of the policy implementation.

'A learning-based understanding of the development of fundamental rights is required, once we acknowledge that we cannot predict in advance all the situations in which obstacles to the internal market or to mutual cooperation in the area of freedom, security and justice will result from the lack of a uniform understanding of fundamental rights, throughout all the EU Member States. It is one thing to say, as the EU Treaty itself does in Article 6 EU, that fundamental rights recognised among the general principles of law may not be violated in the implementation of EU law; it is quite another to find agreement on the desirable degree to which fundamental rights should be harmonized at the level of the EU, and what form such harmonization should take.'⁵⁹⁴

In order to determine the form in which harmonization should take place de Schutter reaches out for new governance known forms. He starts with purely collaborative approach determining their limitations. De Schutter points after Freeman that the stakeholders invited to the process of consultation would have ideally, in the process of institutionalised

⁵⁹¹ Olivier De Schutter and Violeta Moreno Lax, *Human Rights in the Web of Governance: towards a Learning-Based Fundamental Rights Policy for the European Union* (Jean-Yves Carlier, Olivier De Schutter and Marc Verdussen eds, Bruylant 2010). The volume, in fact, tests the procedural role of the EU in promotion and protection of fundamental rights in three areas: health care, rights of the child and asylum and immigration.

⁵⁹² Olivier De Schutter, 'Introduction: Fundamental Rights and the Transformation of Governance in the European Union' in Olivier De Schutter and Violeta Moreno Lax (eds), *Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union* (Bruylant 2010), at 2.

⁵⁹³ Ibid, at 60.

⁵⁹⁴ Ibid, at 2-3.

participation, the possibility not only to provide potential answers, but also to reformulate questions. In reality, however, the process of collaborative governance, is pre-determined by the institution, binding the content to the pre-defined problem. Democratic experimentalism, similarly, whilst not relying on institutions encourages experimentation within sub-units which is to be terminated with the exchange of information – results of experiments. De Schutter emphasised the limitations of this approach underlining the lack of the notion of collective good (since each of the sub-units can define its own interest in the deliberation), the capacity on the part of stakeholders to benefit from the process and, finally, risk associated with presupposition of the shared values.⁵⁹⁵ The outlined limitations of different approaches explain de Schutter's focus on procedural approach rather than that of substantive approach. This premise coincides with the focus of this dissertation thus providing us with yet another dimension of analogy making.

De Schutter's understanding of fundamental rights policy within the EU borders comprised in his search of the solutions which would ensure the finding of best solutions in the conditions of uncertainty as to what those solutions might be.

He points to the establishment of the Fundamental Rights Agency as the indication that the governance approach has been adopted to guide the fundamental rights policy:

'Its establishment provides an indicia that the future of fundamental rights in the European Union will be based in the future on a view of rights as having to be permanently reinvented in the new settings in which they are invoked, and as objectives (or 'values'), the fulfilment of which requires a permanent learning process, both (horizontally) between the Member States and (vertically) between the institutions of the Union and the Member States.'⁵⁹⁶

All of those developments have been taking place in the context of fundamental rights having two basic roles within the EU – that of the shield imposed on the EU legal order⁵⁹⁷, and the positive function in as much as guiding of the EU actors is concerned.⁵⁹⁸ In a phrase: '(t)he growth of EU law should not lead to violations of fundamental rights, and in that sense

⁵⁹⁵ Ibid, at 4-9.

⁵⁹⁶ Ibid, at 10.

⁵⁹⁷ Which is about limiting European legislator and national authorities acting under the EU law whilst not in any way conceived as objectives which are to be achieved, nor in any way affecting the competence allocation. See: Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question'.

⁵⁹⁸ Which reminds of the clearly stated 'promote and uphold' approach in the EU external policy.

these rights must be compiled within its development; but the progress of EU Law should not, in principle, be made dependent on the need to realise fundamental rights⁵⁹⁹.

In order to meet these objectives, the EU may either act and impose common standards on its Member States, or remain passive waiting for the problems to solve themselves on the basis of decentralised approach – both of the approaches may be more or less favourable depending on the area of law at stake and the existing consensus amongst the Member States.⁶⁰⁰ The downside of the passive approach lies, firstly, in the regulatory competition of the Member States which may seek to lower or increase standards and in such a manner to attract investors to their jurisdictions. Secondly, learning and exchange of information and best practices activities remain difficult to conduct in absence of any sort of EU intervention. Nevertheless, the normative claim promoting open deliberation about what the consequences of internal market are and the means of their reduction was made and supported by available examples ranging from health law, non-discrimination and refugees and asylum provisions.⁶⁰¹

De Schutter thus describes the advantages of the reliance on the new governance techniques for the fundamental rights policy of the EU. The added value of the approach lies in facilitating the coordination between the Member States where solutions adopted by one of them can affect those of the others. This coordination does not necessarily need to take a form of the Open Method of Coordination, nor does it need to lead to the adoption of guidelines or strategies by the Member States. Yet even if this was to be the case, the particularity of the area of fundamental rights characterised by the existence of other forums promoting similar types of initiatives, renders adoption of such measures easier.

The development of new governance techniques may serve the fulfilment of three functions:

‘(1) it may facilitate coordination between the Member States where there exists no legal basis for the adoption of common rules;

⁵⁹⁹ De Schutter, at 12.

⁶⁰⁰ De Schutter provides an example of directives concerning advertising, sponsorship, manufacture, presentation and sale of tobacco products and assesses this legislative measure as justified. On the other hand, it is assessed by the European Court of Justice on case by case basis whether the restriction of fundamental freedoms in order to promote higher standards of fundamental rights protection is acceptable under the EU law. See: *ibid*, at 22 – 24.

⁶⁰¹ *Ibid*, at 31-46.

(2) it may facilitate the exercise of any competence which has been attributed to the EC/EU in this field, thus both depoliticising subsidiarity – by limiting the risk of the requirements of subsidiarity and proportionality being instrumentalised, and, in particular, put in the service of the domestic agendas of the Member States - and repoliticising it – by leading to a debate on whether there is a need for an intervention by the Union; and

(3) whether or not the recourse to legislation constitutes an alternative, it may encourage the learning process between the EU Member States which has the potential to improve their approach to the implementation of fundamental rights.⁶⁰²

The analysis of de Schutter of the learning based fundamental rights policy of the EU was in fact the first step to providing the reasons why governance approach is the key to the EU human rights policy. In order to use the de Schutter's intellectual exercise, we need to adjust the underlying assumptions and to recall the earlier on discussed premises of the second wave new governance literature.⁶⁰³

As it was in case of fundamental rights policy, in external sphere we are speaking of a situation of uncertainty as to what the human rights problem is and what could be the solutions to solve it. One may risk the statement that in the EU external relations context, this uncertainty is much higher, and the knowledge gap is much bigger. In addition to this, the EU is to act for the benefit of the values it promotes, yet paying attention that it is not imposing its own approach to human rights⁶⁰⁴, neither is it to act on the premise of the knowledge it gathers. In other words, the EU is not capable of bridging the gap.

Secondly, for the same reason as stated above, both the identification of the problem process as well as the attempt to devise solutions needs to be made in cooperation with third countries. The goal of these activities is both to learn, but also to position the European Union on the international stage. Within the internal, fundamental rights narrative, the legal system of the EU had to respond to the growing tensions between fundamental freedoms and fundamental rights of individuals, and thus accompanying risk of destructive regulatory competition between the Member States.⁶⁰⁵ On the other hand, in the external human rights policy of the European Union as we have seen in Chapter 1, the narrative is focused on

⁶⁰² Ibid, at 52.

⁶⁰³ Dawson, 'Three waves of new governance in the European Union'.

⁶⁰⁴ This statement is obviously a theoretical intellectual construction to be found in literature and presented as the desirable shape of the EU external policy. It allows us, however, to see the analogy between the de Schutter's explanation for the use of governance approach and its transposition to the external policy sphere.

⁶⁰⁵ De Schutter, at 3, 24-31.

problems of incoherence, but also the position and identity of the EU in the world. The EU operates in the sphere of international law where, formally, actors are equal. Equality of actors and universality of norms the EU is to 'promote and uphold' have as their consequence ultimately the similar setting as that within the EU with respect to fundamental rights where the predominance of the four freedoms principle corresponds to the equality of states principle.

As we can see, here even more than in the internal sphere there is a room for new governance based on learning – learning from experiences of the other states (hence state-to-state measures) or from experiences of individuals and organisations (hence the financing instruments). In the external sphere legislation is not about enforcing human rights (any quasi-legislative measures are punitive in character only). It does not focus on the manner in which rights can be exercised; nor does it explain what the standard of protection is with relation to specific rights enshrined in the international treaties. The universality of the approach faced with particularity of every single state and its characteristics, makes it inevitable for entities with elaborate human rights policy to search for measures which escape usual characteristics of international law measures and fall sooner amongst those belonging to governance paradigm.

The new governance approach is to be used even more in the external sphere due to the limited availability of legal instruments. Quasi-legislative multi-, bi-, or unilateral measures even if binding, function within the international legal realm and as such reflect all the inadequacies of the system. New governance approach allows to find the solutions avoiding the existing traps of the EU being a 'legislator', and leading it to be the 'coordinator of efforts'. Clearly, as de Schutter emphasised, this does not mean that for every single right, or in a specific country context a 'Open Method of Coordination' type of instrument needs to be put into place. What it means, instead, is that the approach demonstrated by the European Initiative for Human Rights and Democracy and human rights dialogue with third countries⁶⁰⁶ is about learning and self-reflection. As such, within the governance paradigm,

⁶⁰⁶ Strikingly appears against this background the anecdote presented by the Director of the Fundamental Rights Agency based on his experience of the human rights dialogue undertaken with China. Usually perceived as problematic, the Chinese when presented with the human rights originated problem, and encouraged to discuss modes of its resolving, shared freely their experiences revealing involvement and approach normally unsuspected of them.

and through governance analytical lens completes the picture of the full fledged external policy of the EU.

Chapter 9 - New Paradigm of Evaluation for the EU External Human Rights Policy?

The above presented discussion served the purpose of outlining the alternative means of analysing the EU external human rights policy with the view of extracting 'benchmarks'. The need for such altered benchmarks is evident, especially if we recall the inaptness of the usual methodological tools as demonstrated in Chapters 4, 5, and 6. The described approaches accompanied by the benchmarks provide for a fairly coherent framework of analysis. Yet, the benchmarks, as it seems, do not necessarily need to alter the manner in which the relationship between the classical perceptions based on constitutionalism and rule of law and governance is conceived. They can be taken on a face value with the assumption of parallel existence of the two realms – the normative and empirical ones. Alternatively, the basic analysis presented by this thesis can be perceived (as it has been anticipated in the opening chapters) as the first step to the re-conceptualisation of the legal doctrine of the recent 15 years – that dealing with the changes in governance, constitutionalism and international law with the view of producing a more coherent framework which would acknowledge the extended boundaries of law and incorporate practices instituted as the cures against the insufficient or limiting legal framework.

The two brief sections outline the two outcomes of the analysis: the first will present the benchmarks, whilst the second one will discuss briefly the interaction between the governance and government elements on the basis of its implications for the instrument analysis – here in the context of EU external human rights policy.

1. New - Old - Benchmarks for Evaluation

It seems that the characteristics of new modes of governance correspond almost in a literal manner to the facts and solutions that have been omitted by the rule of law analysis and presented above in Chapter 7. Possibly the only postulate that is not given full account of within the new governance framework is the inter-connectedness of all instruments.

It is interesting to note that the broader categories of accountability and transparency are present in all three sets of the evaluation benchmarks. On the other hand, given that the above mentioned theories concern various structures of authority, not all of the benchmarks would be applicable to the EU external human rights policy. As it was shown in Chapter 2,

there exists a great deal of policy instruments which follow the usual notion of rule of law. Whilst good governance benchmarks provide us with the idea of what would be the desirable state of affairs, the new modes of governance scheme provide us with the ideas of how things should be done. The subsequent analysis will, therefore, take us to the examination whether if we apply the NMG benchmarks (whilst bearing in mind the Rule of Law standards that have been met by the EU), the evaluation of the EU external human rights policy would have been different.

2. Applying the New Governance Benchmarks to the EU External Human Rights Policy

It seems that the new governance benchmarks which were discussed above in a very comprehensive manner complement the rule of law paradigm presented in Chapter 2. Importantly, as we concluded in Chapter 7, the criteria of alternative theoretical framework - proposed new modes of governance - may not substitute these referring to the rule of law; they need to be applied in addition to them, to complement them in order to represent the full, and not fragmented picture. Let us see, how the elements separated from the sieve recalled under Chapter 7 correspond to the components of new modes of governance.

The emphasis on **provisionality** and **revisability** of instruments appears above all in the context of the unilateral instruments addressed at 3rd countries and members of civil society. There the instruments are adopted for a given period - the adoption of financial instruments coincides with a given EU financial perspective, whilst for the GSP+ this period is set from instrument to instrument currently stretching until year 2023. Importantly, both the reform of the financial instruments as well as GSP+ have been broadly discussed with the wider public.⁶⁰⁷ International and multilateral measures, on the other hand do not fulfil in such a clear manner this criterion, although they undergo revision either in a cyclical manner (as was the case with Lomé and then Cotonou arrangements), or as the result of the new policy perspective. Yet, in the latter manner, it is a usual agreement negotiations procedure that prevail and last many years, sometimes not attaining final ratification.⁶⁰⁸ Hence possibly we should not consider this criteria as fulfilled with reference to international agreements.

⁶⁰⁷ See, for the GSP+ open 2011 consultations: http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146362.pdf.
⁶⁰⁸ See the recent case of Ukraine.

Soft action plans are a completely different matter - by nature they are revised together with the states interested. This participatory aspect is also important from this point of view. Finally, the provisionality and revisability of the unilateral measures directed at the EU institutions is obvious, though the conditions under which this is done are much less so. They require a political impulse and impact of consultation and evaluation for the institutions to start acting in the direction of revising such measures. The making of the ones discussed in Chapter 4 followed such impulse given by the Strategic Framework and Action Plan for Human Rights and Democracy.⁶⁰⁹

As we already saw in Chapter 7 almost every single of the instruments involved some sort of **participation** of actors involved: In case of guidelines, guidance notes etc. presented in the Chapter 4 devoted to unilateral instruments directed at the EU, consultations were at the core of the norm creation process. In case of unilateral instruments directed at third countries the consultation is a binding obligation in the course of their implementation whilst the creation (or revision in this case) involved ongoing consultations. Similarly the case can be viewed in case of the adoption of delegated measures used for implementation of such instruments (for instance in the course of devising annual plans of action). In case of international agreements participation is not of such an importance, but there the agreement bodies fill in the void. Hence in every single of the categories of instruments participation appears as the basis on which actions are undertaken or at least it plays a role in implementation activities.

Transparency has been extensively addressed in Part II, however, this is possibly one of the criteria that will always remain unsatisfactory from external point of view both because of the complexity of processes involved and a need for some secrecy because of the protection of other values. Balancing between the need to ensure transparency and other interests including effectiveness of undertaken measures needs to be performed. This adds further to the very much already blurred picture. This contestation makes one wonder whether, perhaps we still do not have sufficient tools at stake for analysing transparency in an appropriate manner taking into consideration also exceptional security and political circumstances.

⁶⁰⁹ EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12)

Evaluation and review as well as **voluntariness** we saw almost in every single part of the analysis above constitute the standing practice of the EU, possibly mostly developed in relation to where the EU money is spent.⁶¹⁰ This criterion is therefore met by the EU almost by default.

The only problematic of the criteria named is that concerning central/horizontal structures of exercising authority. No amount of participation and voluntariness will change the fact that it is the EU in general, and the European Commission in particular that decide upon specific aspects of the policy. In this study we referred to 'good legislator' paradigm or administrator. In some aspects when generally approaching the EU external human rights policy, it could be stated that the EU is a part of many bodies dealing with human rights⁶¹¹ thus forming the part of the horizontal structure of authority. Clearly, however, the structures of power to which the EU belong constitute the weakest of the criteria fulfilled by the EU.

⁶¹⁰ See Chapter 5.

⁶¹¹ See FRAME project findings on the network of the actors involved in the human rights policy worldwide (Deliverable 4.1), at <http://www.fp7-frame.eu>.

Conclusions – The Added Value of the Governance Frameworks of Evaluation to the EU External Human Rights Policy

Governance Approach to the EU External Human Rights Policy

Essentially, the EU in its external policy reproduces available methodologies and instruments; simply, however it does it in the EU-way. There is no consideration given to resources already devoted to the attainment of human rights objectives in other regional organisations (Council of Europe) or on international level within the UN and NGOs auspices. Clearly, the EU could not trust the assessment of those other bodies acutely aware that interests at stake too frequently differ and trying desperately to build its own image. We cannot blame the EU especially for the latter, if we recall criticisms contained in Chapter 1 of this study.

The present analysis has not provided the EU nor its critiques with a specific answer as to whether the instruments of the EU external human rights policy are sufficient or not. Instead, it offers a more comprehensive approach through which this policy area can be viewed. In answering the question as to how things should be done, we offer the principles that should be followed, leaving the assessment of legal form to the rule of law criteria. The results of this study, therefore, permit to leave the black and white realm of rule of law approaches and incorporate the governance criteria into the conventionally performed analysis. Whilst doing so, it takes a stance on the position between the relationship between law and governance - the relationship which has been already proclaimed upon by the institutional and legal setting.

Governance within Law

A very concise overview of the relationship between law and governance has been given by Dawson.⁶¹² His account finishes with the introduction of the third wave of new governance literature which incorporates new governance into the framework of law.

This approach goes beyond hybridity classification developed by de Burca and Scott in the Introduction to *Law and New Governance in the EU and the US*.⁶¹³ There, they assumed that

⁶¹² See above.

law and new governance were complementary to one another and that co-existence of the two modes of exercising authority gives birth to one of three hybrid models. Their theory of hybridity has been subsequently used by other contributors to the volume confirming that the 'old' government and 'new' governance co-habit the same legislative and executive space.⁶¹⁴

Yet the analysis built on the theories of hybridity may go further. The complementarity of the 'governance' and 'government' approaches does not guarantee that they work together for the attainment of set objectives. In addition to the above, when operating as separate, yet, complementing regimes, the hybrid suffers from the downsides of the two of them. It is, therefore, at the same time inflexible (as a part of it operates under the framework of 'hard law') and illegitimate (since it belongs to governance and not democratically created legal regime).

What is the potential of new governance approaches if they are included in the general framework of law? De Witte is of the opinion that the biggest benefit of governance lies in its flexibility which allows for achieving an ultimate compromise. Legal solutions are way more black and white and do not correspond the complexity of the current problem (and governance *sensu largo*) setting.

The incorporation of the governance conditions into the legal realm, by making their fulfilment a part of the legally binding obligations on the institutions has changed the setting - both for the EU, but also for third countries. Recalling the postulate according to which the EU should act as a good legislator, we could state that the EU has fulfilled its mandate by representing its constituents and values they stand for.⁶¹⁵

⁶¹³ De Búrca and Scott, 'Introduction: New Governance, Law and Constitutionalism', at 6-9.

⁶¹⁴ Although depending on which substantial area we are focusing, gap and transformation thesis are relevant as well. See, for instance, in the area not purely conceived of as of new governance - the delimitation and emergence of private regulatory regimes that have *de facto* lead to transformation of the area into almost solely self-regulatory one. One could equally make an argument that this emergence of private regulation was a consequence of the lack of relevant provisions in this area – there was a gap filled through private regulatory exercise.

⁶¹⁵ Allan Rosenthal, 'The 'Good' Legislature' *The Book of the States* 103, at 105. Rosenthal extracts what legislators are to do if they are to be 'good': '1. A connection by legislators to their constituencies and a responsiveness to constituency views where they exist. 2. A balance between the deliberative aspects of law-making on the one hand and the political aspects on the other, ensuring that the process takes into account arguments as to the merits of a measure. This ordinarily means that a legislative chamber delegates a major role to its standing committees which have policy expertise, some continuity of membership and the respect of

In some aspects, however, the good legislator is not enough. Possibly, therefore, the proposal to base the framework of analysis solely on new governance paradigm does not fully encompass the other aspect of EU's activity - that of a good enforcer of rules created under its framework. Perhaps these aspects of the EU could be framed as that of administration. This assertion opens another possibility of approaching EU policies through the lens of administrative law which has been done already⁶¹⁶. The below sections outline the difficulty of such approach, explaining also briefly why new governance provides a more adequate and less problematic approach.

Alternative lens: Global Administrative Law and EU External Human Rights Policy

There exists no one way of addressing the relationship between the Global Administrative law paradigm and the EU human rights policy. Usually, the EU administrative law aspects are considered from the perspective of the development of particular principles of the administrative law as it has been undertaken by the court and subsequently codified in the Article 41 of the Charter for Fundamental Rights. Not much attention is given to the EU as an administrator; save as a global administrator. Yet in the realm of the external human rights policy the EU does act as an administrator following the understanding of the Global Administrative Law proposed by Kingsbury *et al.*

Benedict Kingsbury, Nico Krisch and Richard B. Stewart when drafting the background paper entitled “The Emergence of Global Administrative Law”⁶¹⁷ carefully legitimised the theory of Global Administrative Law through reaching to the 19th Century thought thus showing that presenting governance in terms of administration not only has a long tradition, but also that the subject matter dealt with on the global level has been logically perceived as an

the larger body. 3. Effective legislative leadership. Although leadership matters relatively little with regard to representation, it is hard to imagine the lawmaking process working without committee, party and chamber leadership. Among the many responsibilities of leadership are finding common ground, facilitating compromise, forging consensus, and enabling the legislative majority to find and work its will. It is even harder to imagine that the power of the executive could be balanced without effective leadership. Legislative leaders have to represent the senate and the house to the governor and then negotiate the best deal possible from their chamber's point of view.

⁶¹⁶ See, above all: P. Craig, *EU Administrative Law* (OUP 2012), Ming-Sung Kuo, ‘From Administrative Law to Administrative Legitimation? Transnational Administrative Law and the Process of European Integration’ [Cambridge University Press on behalf of the British Institute of International and Comparative Law] 61 *The International and Comparative Law Quarterly* 855.

⁶¹⁷ Benedict Kingsbury and others, *The emergence of global administrative law* (Institute for International Law and Justice 2004).

administrative matter. This is confirmed by the attempt to delineate it from other actions undertaken on the international level: '(a)s a matter of provisional delineation, global administrative action is rulemaking, adjudications, and other decisions that are neither treaty-making nor simple dispute settlements between parties'⁶¹⁸. From this perspective GAL is narrower than governance approaches which encompass the two categories of actions undertaken by international actors.

Whatever emerged after applying delineation has been divided by GAL's creators into five types of global administration: (1) administration by formal international organizations; (2) administration based on collective action by transnational networks of cooperative arrangements between national regulatory officials; (3) distributed administration conducted by national regulators under treaty, network, or other cooperative regimes; (4) administration by hybrid inter-governmental-private arrangements; (5) administration by private institutions with regulatory functions.⁶¹⁹

Kingsbury's, when putting forward the theory of GAL severely criticised constitutionalist approach to international governance. This critique, however, does not explain why it is the GAL approach that is more persuasive when addressing the issues of global governance. After all, what we are dealing with is the situation in which the substantial scope of regulation is very broad; sources of power are diverse. Yet this is exactly where the focus is placed on the principles of action, on the modes in which entities act. GAL specifically focuses on those principles; and it allows broad application of its paradigm regardless of the international administrative body we are speaking of. Interestingly, the emergence of the Global Administrative Law focused the attention of the academic world in the aftermath of the strong critique against international organisations – especially the UN and the NATO – and the lack of their internal accountability and external responsibility mechanisms.⁶²⁰ Luis Meilan Gil offers further explanation why the principles are central to the conception of GAL:

'There is some spontaneity in this administrative action that has occurred almost "ad hoc" to face realities, as a consequence of the globalization of trade, the technological advances in

⁶¹⁸ Ibid, at 17.

⁶¹⁹ For explanation see: *ibid*, at 20-23.

⁶²⁰ See for instance examples dating back to 1990s provided in: *ibid*, at 31-36.

communications, the supranational scope of sanitary or environmental problems among which those related to climatic changes have acquired and outstanding importance.’⁶²¹

The GAL approach, therefore, refers to the sphere which allows sufficient flexibility for the purposes of the attainment of objectives in varied contexts (mainly geopolitical ones). The working definition of GAL hence encompasses ‘the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make’⁶²². All this must be put within the context where respect of fundamental rights is ensured⁶²³ and supported through national systems based on the democratic principles.⁶²⁴

The above presented outline of Global Administrative Law ideas covers only the essential assumptions underlying the elaborated theory. Whilst resembling to a large extent the new governance theories referred to above, GAL poses two sets of problems - one related to **whether the EU could be perceived as global administrative actor**; the other, **whether the principles could be applied to the EU external action** in general and human rights in particular.

The first step of the analysis relates to the EU’s position as the global administrative actor. The issue is pertinent as it is difficult to include the EU as a participant of one of the five types of the global administration. If we apply the Kingsbury’s *et al.* division of GAL types, to an extent, the EU is an administrative body (or, to be more precise, a collection of administrative bodies) falling under administration by formal international organisations overlapping, depending on the area of its activities with either hybrid inter-governmental-private administrative arrangements (for instance in the area of pharmaceuticals) or distributed administration conducted by national bodies (e. g. in the area of education).

⁶²¹ Jose Luis Meilan Gil, ‘Global Administrative Law and Human Rights’ in Javier Robalino Orellana and Jaime Rodríguez-Arana (eds), *Global Administrative Law: Towards a Lex Administrativa* (CMP Publishing 2010), at 14.

⁶²² See: <http://www.iilj.org/GAL/GALworkingdefinition.asp> (retrieved on 2 September 2012).

⁶²³ Jaime Rodríguez-Arana Muñoz, ‘Approach to Principles of Global Administrative Law’ in Javier Robalino Orellana and Jaime Rodríguez-Arana Muñoz (eds), *Global Administrative Law: Towards Lex Administrativa* (CMP Publishing 2010), at 59.

⁶²⁴ *Ibid.*, at 36.

Yet, ultimately, the EU is a regional organisation and as such cannot have a claim of rulemaking for the international community. Nevertheless, the EU gets a fair amount of attention in the GAL and governance discourse – either as the result of its; or because of lack or inadequacy thereof. This is in part the consequence of the fact that other international actors expect the EU to take a more active position in global dealings.

It is interesting to note that some authors point to the EU as to the author of more established and established principles of GAL. Frequently the Europeanization and globalisation of administrative law are listed one next to the other.⁶²⁵ In other cases, the EU internal sphere is considered as the source for the national and global administrative laws⁶²⁶. For example, one of scholars working in the area - Rodriguez-Arana Munoz devotes substantial amount of his analysis to the jurisprudence of the Luxembourg court and the Charter for Fundamental Rights pointing to the ‘procedural’ construction of rights ‘such as the citizen’s right to a hearing, the guarantee of non-retroactivity of provisions that limit rights, proportionality of sanctions, or the obligation to repair damages cause by defaulting Community norms’⁶²⁷. He also refers to the right to good administration codified in Article 41 of the Charter for Fundamental Rights⁶²⁸. Similarly, Carol Harlow refers to the EU as the source of principles of good administration noting, however, that consolidation of those principles under GAL may happen with disregard for cultural and legal traditions of developing countries.⁶²⁹ Finally, we need to mention the contribution of the EU to the international administrative system as the result of the *Kadi* case and the changes thus induced in the UN anti-terrorist sanction regime.⁶³⁰

⁶²⁵ See, for instance: Giacinto della Cananea, ‘Beyond the State: The Europeanization and Globalization of Procedural Administrative Law’ 563 *European Public Law*.

⁶²⁶ See for instance the bibliography gathered by the Global Administrative Project: <http://www.iilj.org/gal/bibliography/GALBib-VEurope.asp>, accessed on 1 November 2012.

⁶²⁷ Rodriguez-Arana Munoz, at 65.

⁶²⁸ *Ibid*, at 85-89.

⁶²⁹ Carol Harlow, ‘Global Administrative Law: the Quest for Principles and Values’ 17 *The European Journal of International Law* 187, at 189.

⁶³⁰ See, for example: Giacinto della Cananea, ‘Return to the Due Process of Law: The European Union and the Fight Against Terrorism’ 896 *European Law Review*; Mielle Bulterman, ‘Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities’ 739 *Leiden Journal of International Law*.

None of the above, however, portrays the EU as the source of the administrative power and a genuine global actor who in undertaking its activities should be guided by the Global Administrative Law principles.

On the other hand, as it seems the set of principles depends very much on the context and the object of the action.

From this perspective the EU external human rights policy is a very particular case since both the context and the object of the action place the EU as an actor in the Global Administrative Law paradigm.

The context is determined by the reach, on the one hand, and accessibility, on the other, of the tools and instruments used. Following categorisation of the toolbox used for the purpose of this study, we can determine which of them have global; or potentially global reach.

Both multilateral and bilateral agreements and human rights clauses contained therein are binding only for the parties to the agreements. ‘Hard international law’ cannot be, therefore the means for the EU acting as an administrative body. On the other hand, the EU continues to attempt to exert influence over the international negotiations of multilateral treaties – with varied effects, yet obviously with the objective to position itself as an administrator.⁶³¹

Yet, the EU internal acts and documents issued by the EU institutions amount to the policy framework subject to internal accountability principles. The inclusion of human rights clauses in all agreements entered into by the EU, as we have seen, is a product of a long, political, and institutional process; the result of the exchange with the wider (global) civil society, and interaction with third countries. The process finalised with the formal obligation of inclusion of human rights clauses and the ongoing discussion of their format⁶³² corresponds to the GAL paradigm; though ultimately the impact of those discussions is limited.

Unilateral instruments employed by the EU are of different nature. Their adoption underlies the EU internal system of checks and balances as well as that of external regimes. Yet, their use and enforcement is subject to procedures of administrative nature. Furthermore, they

⁶³¹ See: Doha WTO negotiations round, Copenhagen Summit, the EU Special Observer Status at the UN.

⁶³² See: Annex to the European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)) containing the clause format proposed by the European Parliament.

are addressed to the global community according to the objective criteria. The GSP plus regulation and the European Instrument for Human Rights and Democracy (EIHRD) offer examples for the above thesis.

The GSP plus regulation provides a good example of the EU regulating granting of preferential treatment in accordance with the rules determined by the WTO. The regulation has been altered as the result of the decision of the WTO dispute resolution system forcing the EU to introduce objective criteria concerning states which can apply for the preferential treatment. In addition to the above, granting thereof is ruled by a detailed procedure providing for a quasi-appeal mechanism. The missing element in this puzzle is the presence of the participatory mechanism for third countries' assessment as to whether the criteria of GSP plus are fulfilled. On the other hand, every third country may apply for the preferential treatment unlimited amount of times, forcing the European Commission to reconsider its decisions.

The EIHRD, similarly to the GSP plus, is available for objectively determined actors who can claim funding from the European Union. Here, however, the regulation provides for a high flexibility of objectives of the funding and high independence (subject to the internal accountability mechanisms of the EU) of EU delegations as far as programming is concerned. This allows for the participation of local actors in determining the needs of particular countries inasmuch substantial scope of the EIHRD is concerned. Just as with any other financing instrument of the EU, also the EIHRD is ruled by detailed and transparent procedures.

The above examples confirm that in specific contexts the EU does act as a global administrative body given that it fulfils specific criteria. Firstly, its activity must be directed outwardly – addressees of its actions must belong to an international community (though the circle of addressees can be limited by formal criteria). Secondly, the tools used must be of such character as to enable flexibility of action – also on the part of the EU; hence complying with the frequent *ad hoc* standard of actions. They obviously need to comply with other characteristics, yet from the perspective of the EU role this is the most important feature. Finally, the classification of the EU as a global administrative actor requires a specific substantial focus. Human rights provide an excellent example of a globally oriented policy

based on the claim of universality. Funding devoted to pursuit of human rights objectives worldwide could be even denoted as public good which the EU administers on its own accord but for the benefit of a global community.

This conclusion brings us to the analysis of the importance of human rights as the substance of the external policy and global administrative actions. The fact that the EU in its external dealings invokes, albeit inconsistently, the international human rights instruments is very indicative of the space in which it is functioning. It is positioning itself in the middle of the well established institutional and legal sphere acting according to the rules that are present there.

Little has been written about the relationship between GAL and international human rights law. It is clear that the two exist in symbiosis with the third democratic element as the classical triad of human rights, rule of law and democracy. Yet, though it is obvious that human rights law fills the gap in the system of principles of the GAL, it is unclear to what extent GAL is to work for the benefit of human rights movement. The first step towards explanation of this relationship lies in inclusion of human rights as one of the Global Administrative Law substantial areas; the missing one in the NYU's GAL project list⁶³³. Even though it may seem like an obvious endeavour, it is not an easy one. Human rights in the period of their prevalence in the international legal sphere have benefited from a rather established core legal status that came along with the instruments that have been used for their attainment. International legal agreements, judicial enforcement, their universal and inalienable claim amount to a strong position of human rights in legal systems. Consequently not much attention has been devoted to other means of pursuing human rights enlightened objectives – tools that would be considered as positive administrative action.

Final Remarks

The above conducted analysis provides an illustration to a phenomenon that is not new, but for the past 15 years has been present at the core of academic discussion of the EU's contribution to the practice and theory of law in the era of globalisation. The object of the analysis - external human rights policy of the EU - seemed to be the most appropriate

⁶³³ The substantive areas addressed under „Global Norms for National Bodies” heading refers to: trade, competition and intellectual property; foreign investment; development, and environmental regulation. See: <http://www.iilj.org/gal/bibliography/GALBib-II.asp>

substantive area to present how and why the framework of evaluation based on the traditionally conceived rule of law criteria no longer permits the full analysis of the policy instruments. Created and functioning at the intersection of international, international human rights, and the EU legal orders with the view of pursuing objectives which - in my view - entail obligation of best efforts rather than result, these instruments have undergone a long process of adaptation from the 1970s rigid international legalism to experimentalist governance of the present time.

The present state of the art, as far as the instrument creation and application is concerned, differs from the governance v government paradigm represented in the first wave of new governance literature, for rather than working outside of law - in the context - it works within law's boundaries: the constitutive elements of governance structures have been unilaterally incorporated by the EU into the legal framework. If we perceive the policy framework as a whole and assume that either a multilateral frameworks or international agreements form the basis of interactions with third countries, regulations are executive measures taken by the institutions to enforce them subject to governance related conditions such as programming, evaluation, consultation etc. Importantly, the addressees of such measures are third countries, and members of civil societies. This puts the EU institutions in the position of administrators - if not of public goods, then at least administrators of possibility to address public goods related issues.

The reference to the EU external human rights objectives as entailing best efforts is meaningful as it shifts the focus from efficiency of policy and measures it uses, to the adequacy of those measures from the point of view of the manner through which they are employed, and their procedural content. Here again new governance lens permits for a way more comprehensive analysis of the area - with all its virtues and vices. It opens also the way to the expanding of the analysis including such deeply EU law embedded principles as proportionality or subsidiarity which do matter in enforcement by the Commission of the instrumentarium of the EU external human rights policy (proportionality appears in the analysis of Commission's actions both by the Court and the Ombudsman). Given their administrative legal dimension, the need to examine GAL approach in more detail presents itself. This thread of research complements to an extent the recent writings on the decay of

consent in international legal sphere⁶³⁴ and the references that appear in this context to the global public goods⁶³⁵.

With the results of the above study in mind, further avenues of research open up wherever the EU is to strive to fulfil its mandate in external realm and where the object of its strivings constitutes a globally recognised value. Starting off with the improvement of the theoretical framework which has been proposed here, we can test it on the basis of relations with specific countries, or other policy areas where, for the very nature of objectives which are put forward, best efforts will always prevail over the need to attain specific results.

⁶³⁴ Andrew T. Guzman, 'Against Consent' 52 Vancouver Journal of International Law, and on resorting to unilateral measures in this context, see: Andrew T. Guzman, 'Is International Antitrust Possible?' 73 New York University Law Review 1510.

⁶³⁵ Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' 108 American Journal of International Law 1.

Bibliography

Books

Agrast MD, Botero JC and Ponce A, *The WJO Rule of Law Index* (The World Justice Project 2011)

Alfredsson GG, Jonas; Ramcharan, Bertrand G.; de Zayas, Alfred (ed), *International Human Rights Monitoring Mechanisms* (2009)

Allan TRS, *Constitutional justice : a liberal theory of the rule of law* (Oxford University Press 2001)

Bellamy R, *Political constitutionalism : a republican defence of the constitutionality of democracy* (Cambridge University Press 2007)

Benz A, *Governance - Regieren in komplexen Regelsystemen: eine Einführung* (VS Verlag für Sozialwissenschaften 2004)

Benz A, *Handbuch Governance: theoretische Grundlagen und empirische Anwendungsfelder* (1. Aufl. edn, VS Verlag für Sozialwissenschaften 2007)

Besselink LFM, Pennings F and Prechal S (eds), *The Eclipse of the Legality Principle in the European Union* (Kluwer Law International BV 2011)

Betten L, *The incorporation of fundamental rights in the legal order of the European Communities: with special reference to the right to strike* (Utrecht, Rijksuniversiteit, diss, 1985, Asser Institut, 1985)

Bevir M, *The SAGE handbook of governance* (SAGE 2011)

Blockmans S and Hillion C, *EEAS 2.0: A legal commentary on Council Decision 2010/427/EU establishing the organisation and functioning of the European External Action Service* (February 2013)

Brems E, *Human Rights : universality and diversity* (Kluwer Law International 2001)

Burgorgue-Larsen L and others (eds), *Les interactions normatives: droit de l'Union européenne et droit international* (Pedone 2012)

Caney S and Jones P, *Human rights and global diversity* (Portland Frank Cass Publishers 2001)

Cannizzaro E, Palchetti P and Wessel RA (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012)

Cappelletti M and others, *Methods, tools and institutions. Book 2. Political, legal and economic overview* (Walter de Gruyter 1986)

Cardwell PJ (ed), *EU external relations law and policy in the post-Lisbon era* (T. M. C. Asser, Springer 2012)

Cardwell PJ, *EU external relations and systems of governance: the CFSP, Euro-Mediterranean partnership and migration* (Routledge 2009)

Carlier J-Y, De Schutter O and Verdussen (eds), De Schutter O and Moreno Lax V, *Human Rights in tThe Web of Governance: towards a Learning-Based Fundamental Rights Policy for the European Union* (Carlier J-Y, De Schutter O and Verdussen M eds, Bruylant 2010)

Cerutti F and Lucarelli S, *The search for a European identity: Values, policies and legitimacy of the European Union* (Routledge 2008)

Claes E, Devroe W and Keirsbilck B (eds), *Facing the Limits of the Law* (Springer 2009)

Clapham A, Cassese A and Weiler J, *European union, the Human Rights Challenge / V.I Human Rights and the European Community:a critical overview/ Andrew Clapham.-ISBN 3-7890-2280-2 V.II Human Rights and the European Community: methods of protection/ Antonio Cassese, Andrew Clapham, Joseph Weiler, editores Human Rights and the European Community: the substantive law/ Antonio Cassese, Andrew Clapham, Joseph Weiler, eds.-ISBN 3-7890-2282-9* (Nomos 1991)

Claudio D, *The Absence of Direct Effect of WTO in the EC and Other Countries* (Centro interuniversitario sul diritto delle organizzazioni internazionali economiche CIDOIE 2010)

Colebatch H, *Beyond the policy cycle* (Allen & Unwin, Sydney 2006)

Corradetti C, *Human rights in Europe : theory and practice* (XL 2006)

Craig P, *EU Administrative Law* (OUP 2012)

Craig P and De Búrca G, *EU Law, Text, Cases and Materials* (Fourth edn, Oxford University Press 2008)

Craig P and De Búrca G, *The evolution of EU law* (2nd edn, Oxford University Press 2011)

Cremona M (ed), *Developments in EU External Relations Law* (Oxford University Press 2008)

Cremona M (ed), *The Enlargement of the European Union* (Hart Publishing 2003)

Cremona M, 'Flexible Models: External Policy and the European Economic Consitution' in De Búrca (ed), *Constitutional Change in the EU* (Hart Publishing 2000)

Dashwood A and Maresceau M (eds), *Law and Practice of EU External Relations - Salient Features of a Changing Landscape* (Cambridge University Press 2011)

De Búrca (eds), *Law and New Governance in the EU and the US* (Hart 2006)

De Búrca G and Scott J (eds), *Constitutional Change in the EU* (Hart Publishing 2000)

De Búrca G and Scott J, 'Introduction: New Governance, Law and Constitutionalism' in De Búrca G and Scott J (eds), *Law and New Governance in the EU and the US* (Hart 2006)

De Búrca G, *EU International Relations: The Governance Mode of Foreign Policy* (NYU Law School 2010)

De Schutter O and Moreno Lax V (eds), *Human Rights in the Web of Governance: Towards a Learning-Based Fundamental Rights Policy for the European Union* (Bruylant 2010)

De Wet E, 'Holding International Institutions Accountable: the Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' 19 *German Law Journal*

De Wet E, 'The International Constitutional Order' 55 *International & Comparative Law Quarterly* 51

De Wet E, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalism?' 5 *European Constitutional Law Review* 284

Dicey A and Wade E, *Introduction to the study of the law of the Constitution* (10th edn, Macmillan; St. Martin's Press 1961)

Dworkin R, *A matter of principle* (Clarendon Press 1986)

Dworkin R, *Law's empire* (Fontana 1986)

Eisgruber C and Sajó As, *Global justice and the bulwarks of localism : human rights in context* (M. Nijhoff 2005)

Fierro Sedano E, *The EU's approach to human rights conditionality in practice* (M. Nijhoff 2003)

Finnis J, *Natural law and natural rights* (Clarendon 1980)

Flores IB and Himma KE (eds), *Law, Liberty, and the Rule of Law* (Springer 2013)

Forsythe DP, *Human Rights and Diversity* (University of Nebraska Press 2004)

Fukuyama F, *The end of history and the last man* (Hamish Hamilton 1992)

Fuller L, *The morality of law* (Rev. edn, Yale University Press 1977)

Galtung J and International Peace Research Institute., *The European Community: a superpower in the making* (Universitetforlaget; Allen and Unwin 1973)

Gearty C, *Situating international human rights law in an age of counter-terrorism* (Hart Publishing 2012)

Goldoni M, *Our Global Neighbourhood* (Oxford University Press 1995)

Gries T and Alleweldt R, *Human rights within the European Union* (BWV, Berliner Wissenschafts-Verlag 2004)

Hart H, *Essays in jurisprudence and philosophy* (Clarendon Press; Oxford University Press 1983)

Hayek F, *The road to serfdom* (Routledge and Kegan Paul 1976)

Howlett M, Ramesh M and Perl A, *Studying public policy: Policy cycles and policy subsystems*, vol 163 (Cambridge Univ Press 1995)

Jacobs F, *The sovereignty of law : the European way* (Cambridge University Press 2007)

Joseph S, *Blame it on the WTO?: a human rights critique* (Oxford University Press 2011)

Kingsbury B and others, *The emergence of global administrative law* (Institute for International Law and Justice 2004)

Kinley D, 'The universalizing of human rights and economic globalizatoion - What roles for the rule of law?' in Zifcak S (ed), *Globalisation and the Rule of Law* (Routledge 2005)

Kinzelbach K and Kozma JK, 'Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights ' 10 *Perspectives on European Politics and Society* 17

Kjeær AM, *Governance* (Polity Press 2004)

Klabbers J, Peters A and Ulfstein G, *The constitutionalization of international law* (Oxford University Press 2011)

Klabbers J, *Treaties, Conclusion and Entry into Force* (Max Planck Institute for Comparative Public Law and International Law 2006)

Klein A, 'Judging as Nudging: New Governance Approaches for the Enforceent of Constitutional Social and Economic Rights' *Columbia Human Rights Law Review*

Kokott J and Hoffmeister F, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' 90 *The American Journal of International Law* 664

Koutrakos P, *Trade, foreign policy, and defence in EU constitutional law : the legal regulation of sanctions, exports of dual-use goods and armaments* (Hart Pub. 2001)

Kramer MH, *Where law and morality meet* (Oxford University Press 2004)

Kronenberger V, *The European Union and the international legal order : discord or harmony?* (T.M.C. Asser Press 2001)

Lampe K, *Human rights in the context of EU foreign policy and enlargement* (1. Aufl. edn, Nomos 2007)

Leino-Sandberg P, *Universality as Particularity - the Politics of Human Rights in the European Union* (The Erik Castrén Institute Research Reports 2005)

Lerner D and Lasswell HD, *The policy sciences; recent developments in scope and method* (Stanford University Press 1951)

Lindahl H, *A right to inclusion and exclusion? : normative fault lines of the EU's area of freedom, security and justice* (Hart Pub. 2009)

Marks S, *The riddle of all constitutions : international law, democracy and the critique of ideology* (Oxford University Press 2000)

Mattei U and Nader L, *Plunder : when the rule of law is illegal* (Blackwell 2008)

May J and Wildavsky A, *The policy cycle* (Sage publications 1978)

Mayntz R and Planck M-Institut für Gesellschaftsforschung., *The architecture of multi-level governance of economic sectors* (MPIfG 2007)

Meilan Gil JL, 'Global Administrative Law and Human Rights' in Robalino Orellana J and Rodríguez-Arana J (eds), *Global Administrative Law: Towards a Lex Administrativa* (CMP Publishing 2010)

Michałowska G (ed), *Ochrona praw człowieka w Radzie Europy i w Unii Europejskiej* (Wydawnictwa Akademickie i Profesjonalne 2007)

Munster Rv, *Securitising immigration : the politics of risk in the EU* (Palgrave Macmillan 2009)

Neuwahl NA and Rosas A (eds), *The European Union and Human Rights* (Kluwer Law International 1995)

Nijman JE and Nollkaemper A, *New perspectives on the divide between national and international law* (Oxford University Press 2007)

Ojo BA, *Human rights and the new world order : universality, acceptability and human diversity* (Nova Science Publishers 1997)

Palombella G and Walker N (eds), *Relocating the Rule of Law* (Hart Publishing 2009)

Petersmann E-U, Harvard Law School. Jean Monnet Chair. and Jean Monnet Program, *Time for integrating human rights into the law of worldwide organizations : lessons from European Integration Law for Global Integration Law* (Harvard Law School 2001)

Prechal S, van Roermund B and Oxford University Press., *The Coherence of EU Law The Search for Unity in Divergent Concepts* (Oxford University Press 2008)

Raz J, *Ethics in the public domain: essays in the morality of law and politics* (Clarendon Press; Oxford University Press 1994)

Raz J, *The authority of law: essays on law and morality* (Clarendon Press; Oxford University Press 1979)

Robalino Orellana J and Rodriguez-Arana Munoz J (eds), *Global Administrative Law: Towards Lex Administrativa* (CMP Publishing 2010)

Ruggie J, *Protect, Respect and Remedy: a Framework for Business and Human Rights Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises* (United Nations 2008)

Sampford C, 'Reconceiving the rule of law for a globalizing world' in Zifcak S (ed), *Globalisation and the Rule of Law* (Routledge 2005)

Shaw J and More G (eds), *New legal dynamics of European Union* (Clarendon Press 1995)

Schmale W, Aldeeb Abu-Sahlieh SA and Ruhr Universität Bochum., *Human rights and cultural diversity : Europe, Arabic-Islamic world, Africa, China* (Keip Pub. 1993)

Schmitt C, *Der Begriff des Politischen* (Duncker & Humblot 1979)

Schmitt C, *Der Nomos der Erde : im Völkerrecht des Jus Publicum Europaeum* (3. Aufl.[unveränd. Nachdr. d. 1950 erschienenen 1. Aufl.] edn, Duncker & Humblot 1988)

Schmitt C, *Le nomos de la terre dans le droit des gens du jus publicum europaeum* (Presses Universitaires de France 2001)

Schuppert GF, *Governance-Forschung: Vergewisserung über Stand und Entwicklungslinien* (Nomos 2005)

Scott J and De Búrca G, *Constitutional change in the EU: from uniformity to flexibility?* (Hart 2000)

Sen A, 'Elements of a theory of human rights' 32 *Philos Public Aff* 315

Sen A, *Development as freedom* (Oxford University Press 1999)

Sen A, *The idea of justice* (Allen Lane 2009)

Shaw J, 'Relating Constitutionalism and Flexibility in the European Union' in De Búrca G and Scott J (eds), *Constitutional Change in the EU* (Hart Publishing 2000)

Slaughter A, *A new world order* (Princeton University Press 2004)

Smith K, *European Union foreign policy in a changing world* (2nd edn, Polity 2008)

Sozański J, *Umowy Międzynarodowe Unii Europejskiej po Traktacie z Lizbony* (Polskie Wydawnictwo Prawnicze Iuris Sp. z o. o. 2011)

Cremona M and Witte Bd (eds), *EU foreign relations law : constitutional fundamentals* (Hart 2008)

Steiner H, Alston P and Goodman R, *International human rights in context: law, politics, morals: text and materials / Henry J. Steiner, Philip Alston, Ryan Goodman* (3rd edn, Oxford University Press 2008)

- Sudre F and Quellien S, *Droit communautaire des droits fondamentaux: recueil de decisions de la Cour de justice des Communautés europeennes* (Bruylant 1999)
- Sunga L, *Report: EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward* (2010)
- Palombella G and Walker N (eds), *Relocating the Rule of Law* (Hart Publishing 2009)
- Tamanaha BZ, *Law as a Means to an End Threat to the Rule of Law* (Cambridge University Press 2006)
- Tamanaha BZ, *On the rule of law : history, politics, theory* (Cambridge University Press 2004)
- Sadurski W, Czarnota A and Krygier M (eds), *Spreading democracy and the rule of law? : the impact of EU enlargement on the rule of law, democracy and constitutionalism in post-communist legal orders* (Springer 2006)
- Tay AE-S and others, *Teaching human rights* (Australian Govt. Pub. Service 1981)
- Tocci N, *The Widening Gap between Rhetoric and Reality in EU Policy towards the Israeli-Palestinian Conflict* (Centre for European Policy Studies 2005)
- Tomuschat C, Academy of European Law. and European University Institute., *Human rights : between idealism and realism* (Oxford University Press 2003)
- Van Vooren B, Blockmans S and Wouters J, *The EU's role in global governance the legal dimension* (1st edn, Oxford University Press, 2013)
- LFM, Pennings F and Prechal S (eds), *The Eclipse of the Legality Principle of the European Union* (Kluwer Law International BV 2011)
- Von Bogdandy A., 'The concept and the rule of law' 43 Georgia Law Review
- Walker N, 'Coherence in Foreign Policy – the Legal Dimension' in Koutrakos P (ed), *European Foreign Policy: Legal and Political Perspectives* (Edward Elgar 2011)
- Walker N, 'EU Constitutionalism and New Governance' in De Búrca G and Scott J (eds), *Law and New Governance in the EU and the US* (Hart 2006)
- Walker N, 'The idea of constitutional pluralism' 65 The Modern Law Review 317
- Walker N, 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Palombella G and Walker N (eds), *Relocating the Rule of Law* (Hart Publishing 2009)
- Weiler J, *The constitution of Europe : "do the new clothes have an emperor?" and other essays on European integration* (Cambridge University Press 1999)
- Wennerström EO, *The rule of law and the European Union* (Thesis (PhD), Iustus, Uppsala universitet 2007)
- Wessel R (eds), 'Good Governance and the European Union' (Intersentia 2005)

Williams AJ, *The ethos of Europe : values, law and justice in the EU* (Cambridge University Press 2010)

Zifcak S (ed), *Globalisation and the Rule of Law* (Routledge 2005)

Journal Articles

Aaronson S, 'Seeping in Slowly: How Human Rights Concerns are Penetrating the WTO' *World Trade Review*, Vol 6, No 3, 413-449, 2007

Agrast MD, Botero JC and Ponce A, 'The WJO Rule of Law Index' (The World Justice Project 2011)

Albi A, 'Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums' 15 *European Law Journal*

Allan TRS, 'Constitutional justice: a liberal theory of the rule of law' (Oxford University Press 2001)

Alston P and Weiler J, 'An 'ever closer union' in need of a human rights policy : the European Union and human rights in Alston P (ed)', (Oxford University Press 1999)

Alston P, 'Bustelo MR and Heenan J, The EU and human rights' (Oxford University Press 1999)

Alston P, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' 13 *European Journal of International Law* 815

Alston P, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate seen through the Lens of the Millennium Development Goals.' 27 *Human Rights Quarterly* 755

Alston P, Robinson M and New York University. 'Center for Human Rights and Global Justice., Human rights and development : towards mutual reinforcement' (Oxford University Press 2005)

Althaus C, Bridgman P and Davis G, 'The Australian policy handbook' (4th edn, Allen & Unwin 2007)

Arsenjeva J, 'Briefing Paper: Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU's External Relations' (2013)

Ashton C, 'Speech to the European Parliament on Annual Human Rights Report' (15 December 2010)

Ashton C, 'Speech to the European Parliament on Human Rights' (16 June 2010)

Avbelj M and Komárek J, 'Four visions of constitutional pluralism' (Cambridge Univ Press 2008)

Barcz J, 'Fundamental rights protection in the European Union' (Wyd. 1. edn, Wydawn. C.H. Beck 2009)

Bartels L, 'Human Rights and Sustainable Development Obligations in EU Free Trade Agreements' University of Cambridge Faculty of Law Legal Studies Research Paper Series

Bartels L, 'Human rights conditionality in the EU's international agreements' (Oxford University Press 2005)

Beaulac S, 'The Rule of Law in International Law Today' in Palombella G and Walker N (eds), *Relocating the Rule of Law* (Hart Publishing 2009)

Behr H, 'The European Union in the legacies of imperial rule? EU accession politics viewed from a historical comparative perspective' 13 *European Journal of International Relations* 239

Bellamy R, 'Political constitutionalism: a republican defence of the constitutionality of democracy' (Cambridge University Press 2007)

Bennett K, 'Study for the European Parliament, Directorate-General for External Policies 'Assessing the Implementation of the European Union Guidelines on Human Rights Defenders - the Cases of Kyrgyzstan, Thailand, and Tunisia'

Benz A, 'Federalism and international law through the lens of legal pluralism' 73 *Missouri Law Review*

Berman P, 'Global legal pluralism: a jurisprudence of law beyond borders' (Cambridge University Press 2012)

Berman P, 'Global legal pluralism' 80 *Southern California Review*

Besselink L, Pennings F and Prechal S (eds), 'The Eclipse of the Legality Principle in the European Union' (Kluwer Law International BV 2011)

Besselink L, Pennings F and Prechal S, 'The eclipse of the legality principle in the European Union' (Kluwer Law International BV 2011)

Besson S, 'European Legal Pluralism after Kadi' 5 *European Constitutional Law Review* 237

Besson S, 'The European Union and Human Rights: Towards a Post-National Human Rights Institution' 6 *Human Rights Law Review*

Bignami F, 'Three Generations of Participation Rights Before the European Commission' *Law and Contemporary Problems* <<http://scholarship.law.duke.edu/lcp/vol68/iss1/4>>

Blockmans S and Erkelens L, 'Setting up the European External Action Service: An institutional act of balance' 1 *CLEER Working Paper*

Blockmans S and Wessel RA, 'The influence of international organisations on the EU and its legal order: between autonomy and dependence' in *Between Autonomy and Dependence* (Springer 2013)

Bogdandy Av, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' 37 *Common Market Law Review* 1307

Bronckers M, 'From "direct effect" to "muted dialogue" : recent developments in the European courts' case law on the WTO and beyond ' 11 *Journal of International Economic Law* 885

Bronckers M, 'Fundamental Rights and the United Nations Financial Sanction Regime: The Kadi and Yusuf Judgments of the Court of First Instance of the European Communities' 739 *Leiden Journal of International Law*

Cannizzaro E, Palchetti P and Wessel RA (eds), 'International Law as Law of the European Union' (Martinus Nijhoff Publishers 2012)

Chesterman S, 'An International Rule of Law' 56 *American Journal of Comparative Law*

Chesterman S, 'Rule of Law' *Max Planck Encyclopedia of International Public Law*, online edition

Craig P, 'Formal and Substantive Conception of the Rule of Law: an Analytical Framework' *Public Law*

Curtin D and Eckes C, 'Kadi Case: Mapping the Boundaries between the Executive and the Judiciary in Europe, The' 5 *Int'l Org L Rev* 365

Curtin D and Nollkaemper A, 'Conceptualizing accountability in international and European law' 36 *Netherlands Yearbook of International Law* 3

Curtin D, Hofmann H and Mendes J, 'Constitutionalising EU Executive Rule-Making Procedures: A Research Agenda' 19 *European Law Journal*

D'Aspremont J and Dopagne F, 'Kadi: The ECJ's Reminder of the Elementary Divide between Legal Orders' 5 *Int'l Org L Rev* 371

Dauses M, 'The Protection of Fundamental Rights in the Community Legal Order' 10 *European Law Review*

Dawson M, 'New governance and the transformation of European law : coordinating EU social law and policy' (Published version of EUI PhD thesis, Cambridge University Press, 2011)

Dawson M, 'Three waves of new governance in the European Union' 36 *European Law Review* 208

De Angelis E, 'The effects of WTO law and rulings on the EC domestic legal order: a critical review of the most recent developments of the ECJ case law' 15 *International trade law & regulation* 88

De Búrca (ed), 'Coherence through Law: What difference will the Treaty of Lisbon make?' 3 Hamburg Review of Social Sciences

De Burca G, 'Beyond the Charter: How Enlargement Has Enlarged the Human Rights Policy of the European Union' 27 Fordham Int'l LJ 679

De Burca G, 'The EU, the European Court of Justice and the International Legal Order after Kadi.' 1 Harvard International Law Journal

De Búrca G, 'The Evolution of EU Human Rights Law' in Craig PP and De Búrca G (eds), *The Evolution of EU Law* (Oxford University Press 2011)

De Búrca G, 'The Road Not Taken: The EU as a Global Human Rights Actor' 105 American Journal of International Law

De Wet E, 'Holding International Institutions Accountable: the Complementary Role of Non-Judicial Oversight Mechanisms and Judicial Review' 19 German Law Journal

De Wet E, 'The International Constitutional Order' 55 International & Comparative Law Quarterly 51

De Wet E, 'The Role of European Courts in the Development of a Hierarchy of Norms within International Law: Evidence of Constitutionalism?' 5 European Constitutional Law Review 284

Deirdre CM and Dekker I, 'Good Governance: the Concept and its Application by the European Union' in Wessel RA and Deirdre CM (eds), *Good Governance and the European Union* (Intersentia 2005)

Della Cananea G, 'Beyond the State: The Europeanization and Globalization of Procedural Administrative Law' 563 European Public Law

Della Cananea G, 'Return to the Due Process of Law: The European Union and the Fight Against Terrorism' 896 European Law Review

Diedrichs U, 'Overview Paper on Classification and Mapping of Governance Modes (ref. no 1/D08)' NewGov New Modes of Governance Project

Dirosa R, 'Human Rights Priorities of the Belgian Presidency 2010'
<<http://www.docstoc.com/docs/74143419/Human-Rights-Priorities-of-the-Belgian-EU-Presidency>, <http://www.boell.de/de/navigation/europa-transatlantik-10611.html>>

Duquette E, 'Human Rights in the European Union: Internal Versus External Objectives' 34 Cornell International Law Journal

Eeckhout P, 'The EU Charter of Fundamental Rights and the Federal Question' 39 Common Market Law Review

Faracik B, 'Human Rights and Democracy at the Heart of EU Actions, i. e. 'EU Strategy for Human Rights in External Action' Policy Papers of Helsinki Foundation for Human Rights

FIDH, 'Contribution to the Informal COHOM dedicated to the strategic review of the EU human rights policy' <<http://www.fidh.org/en/FIDH-Contribution-to-the-Informal>>

Esty DC, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' [The Yale Law Journal Company, Inc.] 115 The Yale Law Journal 1490

Finnemore M and Sikkink K, 'International Norm Dynamics and Political Change' 52 International Organization 887

Goldoni M, 'Constitutional pluralism and the question of the European common good' 18 European Law Journal 385

Griller S, 'International law, human rights and the European Community's autonomous legal order: notes on the European Court of Justice decision in Kadi' 4 Eur Const Law Rev 528

Guzman AT, 'Is International Antitrust Possible?' 73 New York University Law Review 1510

Guzman AT, 'Against Consent' 52 Vancouver Journal of International Law

Habermas J, 'A Political Constitution for a Pluralist Society?' [Blackwell Publishing Inc] 34 Journal of Chinese Philosophy 331

Habermas J, 'The European Nation-State and the Pressures of Globalization' New Left Review <<http://newleftreview.org/l/235/jurgen-habermas-the-european-nation-state-and-the-pressures-of-globalization>>

Habermas J, 'Why Europe Needs a Constitution' 11 New Left Review

Harlow C, 'Global Administrative Law: the Quest for Principles and Values' 17 The European Journal of International Law 187

Hill C, 'Capability-Expectations Gap, or conceptualising Europe's International Role' 31 Journal of Common Market Studies

Isiksel NT, 'Fundamental rights in the EU after Kadi and Al Barakaat' 16 European Law Journal 551

Jacque JP, 'The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' 48 Common Market Law Review 995

Jägers N, 'The World Trade Organization and Human Rights: The Role of Principles of Good Governance' Available at SSRN 1844305

Jann W and Wegrich K, '4 Theories of the Policy Cycle' Handbook of public policy analysis 43

Jann W and Wegrich K, 'Phasenmodelle und Politikprozesse: der policy cycle' Lehrbuch der Politikfeldanalyse, München/Wien: Oldenbourg 71

Jenkins-Smith H and Sabatier P, 'The study of public policy processes' P Lee, C Estes, & F Rodriguez, The Nation's Health 135

Kaufmann D and Kraay A, 'Governance indicators : where are we, where should we be going ?' 23 *The World Bank Research Observer* 1

Kinzelbach K and Kozma JK, 'Portraying Normative Legitimacy: The EU in Need of Institutional Safeguards for Human Rights ' 10 *Perspectives on European Politics and Society* 17

Klein A, 'Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights' *Columbia Human Rights Law Review*

Kokott J and Hoffmeister F, 'Opinion 2/94, Accession of the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms' 90 *The American Journal of International Law* 664

Koskeniemi M and Leino P, 'Fragmentation of International Law? Postmodern Anxieties' 15 *Leiden Journal of International Law* 553

Krisch N, 'The Open Architecture of European Human Rights Law' [Wiley on behalf of the *Modern Law Review*] 71 *The Modern Law Review* 183

Krisch N, 'The pluralism of global administrative law' 17 *European Journal of International Law* 247

Krisch N, 'The Decay of Consent: International Law in an Age of Global Public Goods' 108 *American Journal of International Law* 1

Kuijper PJ and Bronckers M, 'WTO Law in the European Court of Justice' 42 *Common Market Law Review* 1313

Kuijper PJ, 'Fifty Years of EU/EC External Relations: Continuity and the Dialogue Between Judges and Member States as Constitutional Legislators' *Fordham International Law Journal* <<http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=2123&context=ilj>>

Kumm M—, 'Constitutionalism and experimentalist governance' 6 *Regulation & Governance* 401

Kumm M, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' 44 *Virginia Journal of International Law*

Ladeur K-H, 'Theory of Governance' *Max Planck Encyclopedia of International Public Law*, online edition

Larik J, 'Two Ships in the Night or in the Same Boat Together: How the ECJ Squared the Circle and Foreshadowed Lisbon in its Kadi Judgment' *Yearbook of Polish European Studies* 149

Lavenex S, 'Concentric circles of flexible 'EUropean' integration: A typology of EU external governance relations' 9 *Comparative European Politics* 372

Laws S, 'Law and Democracy' *Public Law*

Laws S, 'The Constitution: Morals and Rights' Public Law

Laws SJ, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' Public Law

Laws SJ, 'Law and Democracy' Public Law

Laws SJ, 'The Constitution: Morals and Rights' Public Law

Lerch M and Schwellnus G, 'Normative by nature? The role of coherence in justifying the EU's external human rights policy' 13 Journal of European Public Policy

Lindner JF, 'Zur grundsätzlichen Bedeutung des Protokolls über die Anwendung der Grundrechtecharta auf Polen und das Vereinigte Königreich : Zugleich ein Beitrag zur Auslegung von Art. 51 EGC' 6 Europarecht 786

Lochbihler B, 'Editorial: Human Rights and Democracy: Waiting for the «silver thread» to become visible and credible - Letter to the High Representative Catherine Ashton of 27 October 2011' OPPD Newsletter: News - Strengthening Parliaments Worldwide
<http://www.europarl.europa.eu/pdf/oppd/Page_1/newsletter2011-12.pdf>

MacCormick N, 'Der Rechtsstaat und die Rule of Law' 39 Juristenzeitung

McCorquodale R (ed), *The Rule of Law in International and Comparative Context* (British Institute of International and Comparative Law 2010)

Maduro M, 'Three Claims of Constitutional Pluralism' Constitutional Pluralism in the European Union and Beyond 67

Manners I and Københavns universitet. Center for Freds-og Konfliktforskning., *Normative power Europe : a contradiction in terms?* (COPRI 2000)

Manners I, 'The normative ethics of the European Union' 84 International Affairs 45

Merlingen M, Mudde C and Sedelmeier U, 'The Right and the Righteous? European Norms, Domestic Politics and the Sanctions against Austria' 39 Journal of Common Market Studies

Ming-Sung Kuo, 'From Administrative Law to Administrative Legitimacy? Transnational Administrative Law and the Process of European Integration' [Cambridge University Press on behalf of the British Institute of International and Comparative Law] 61 The International and Comparative Law Quarterly 855

Mole N, 'Family reunification in EU law and under the ECHR' Family Reunification Project WP
<<http://familyreunification.eu/wp-content/uploads/2012/05/Aire-Family-reunification-in-EU-law-and-under-the-ECHR.pdf>>

Nations SGotU, 'Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/65/318'

Nations TS-GotU, 'Guidance Note of the Secretary-General: UN Approach to Assistance for Strengthening the Rule of Law at the International Level' (*United Nations*, 2011)
<<http://www.unrol.org/doc.aspx?d=3063>>

Network HRD, 'European Parliament: A more Consistent and Coherent Approach on Human Rights and Democracy is Needed'
<http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/2b_hrdn_/2b_hrdn_en.pdf>

Nogueras DJL and Martinez LMH, 'Human Rights Conditionality in the External Trade of the European Union: Legal and Legitimacy Problems' 7 *Colum J Eur L* 307

OECD, 'Partnership for Democratic Governance'
<http://www.oecd.org/pages/0,3417,en_39406396_39406575_1_1_1_1_1,00.html>

Osica O and Trzaskowski R, 'Europejska Służba Działań Zewnętrznych. Implikacje dla instytucji i stosunków zewnętrznych Unii Europejskiej' 2 *Nowa Europa Przegląd Natoliński*

Pearson G, 'Landmark revision of the EU's human rights and democracy policy 2012' Policy Papers of Helsinki Foundation for Human Rights

Pescatore P, 'The Context and Significance of Fundamental Rights in the Law of the European Communities' 2 *Human Rights Law Journal*

Petersmann E-U, 'Constitutionalism and International Organizations' 17 *Nw J Int'l L & Bus* 398

Petersmann E-U—, 'How to Constitutionalize International Law and Foreign Policy for the Benefit of Civil Society' 20 *Mich J Int'l L* 1

Petersmann E-U—, 'Human rights require 'cosmopolitan constitutionalism' and cosmopolitan law for democratic governance of public goods'

Petersmann E-U—, 'Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' 13 *European Journal of International Law*

Quick R and Schmulling U, 'A New Approach to Preferences: The Review of European GSP Scheme' 6 *Global trade and customs journal* 9

Raz J, 'The Rule of Law and Its Virtue' 93 *The Law Quarterly Review*

Regelsberger R and Wessels W, 'The CFSP Institutions and Procedures: A Third Way for the Second Pillar' 1 *European Foreign Affairs Review*

Reiss J, 'Innovative Governance in a Federal Europe: Implementing the Convention on the Rights of Persons with Disabilities' 20 *European Law Journal* 107

Rosas A, 'Is the EU a Human Rights Organisation?' 11/2011 CLEER Working Paper

Rosenfeld M, 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 Southern California Law Review

Rosenthal A, 'The 'Good' Legislature' The Book of the States 103

Sabatier PA, 'The need for better theories' Theories of the policy process 3

Sabel CF and Zeitlin J, 'Learning from Difference: The New Architecture of Experimentalist Governance in the European Union' EUROGOV Papers,

Scheuner U, 'Fundamental Rights in European Community Law and National Constitutional Law' 12 Common Market Law Review

Schmale W, Aldeeb Abu-Sahlieh SA and Ruhr Universität Bochum., *Human rights and cultural diversity : Europe, Arabic-Islamic world, Africa, China* (Keip Pub. 1993)

Schmitt C, *Der Begriff des Politischen* (Duncker & Humblot 1979)

Schuppert GF, *Governance-Forschung : Vergewisserung über Stand und Entwicklungslinien* (Nomos 2005)

Scott J and De Búrca G, *Constitutional change in the EU : from uniformity to flexibility?* (Hart 2000)

Sen A, 'Elements of a theory of human rights' 32 Philos Public Aff 315

Sen A, *The idea of justice* (Allen Lane 2009)

Sen AK, *Development as freedom* (Oxford University Press 1999)

Service ECEEA, 'Joint Staff Working Document on Advancing of the Principle of Complementarity: Toolkit for Bridging the Gap Between International&National Justice' <http://eeas.europa.eu/human_rights/icc/docs/joint_staff_en.pdf>

Shaw J, 'Relating Constitutionalism and Flexibility in the European Union' in De Búrca G and Scott J (eds), *Constitutional Change in the EU* (Hart Publishing 2000)

Shmitt C, *Der Nomos der Erde : im Völkerrecht des Jus Publicum Europaeum* (3. Aufl.[unveränd. Nachdr. d. 1950 erschienenen 1. Aufl.] edn, Duncker & Humblot 1988)

Shmitt C, *Le nomos de la terre dans le droit des gens du jus publicum europaeum* (Presses Universitaires de France 2001)

Sinclair TJ, *Global governance* (Polity Press : [distributor] John Wiley and Sons Ltd : [distributor] John Wiley & Sons Australia Ltd : [distributor] John Wiley & Sons Australia Ltd : [distributor] PSD Promotions (Pty) Ltd : [distributor] John Wiley & Sons 2012)

Slaughter A-M, *A new world order* (Princeton University Press 2004)

Smismans S, 'New Modes of Governance and the Participatory Myth' European Governance Papers (EUROGOV) No N-06-01 <<http://www.eu-newgov.org/>>

- Smith KE, *European Union foreign policy in a changing world* (2nd edn, Polity 2008)
- Sozański J, *Umowy Międzynarodowe Unii Europejskiej po Traktacie z Lizbony* (Polskie Wydawnictwo Prawnicze Iuris Sp. z o. o. 2011)
- Spaventa E, 'Fundamental What? The Difficult Relationship between Foreign Policy and Fundamental Rights' in Cremona M and Witte Bd (eds), *EU foreign relations law : constitutional fundamentals* (Hart 2008)
- Stone Sweet A, 'Constitutionalism, legal pluralism, and international regimes' 16 *Indiana Journal of Global Legal Studies* 621
- Suchman MC, 'Managing Legitimacy: Strategic and Institutional Approaches' 20 *The Academy of Management Review* 40
- Taiwo O, 'The rule of law: The new leviathan?' 12 *Canadian Journal of Law and Jurisprudence* 151
- Tamanaha BZ, 'Understanding legal pluralism: past to present, local to global' 30 *Sydney L Rev* 375
- Terpan F, 'Soft Law in the European Union—The Changing Nature of EU Law' *European Law Journal*
- Teubner G, 'Global Bukowina: legal pluralism in the world society' 3 *Global law without a state*
- Teubner G, 'Two Faces of Janus: Rethinking Legal Pluralism, The' 13 *Cardozo L Rev* 1443
- Treib O, Baehr H and Falkner G, 'Modes of Governance: a Note Towards Conceptual Clarification' N-05-02 *European Governance Papers*
- Van Vooren B, 'A legal-institutional perspective on the European External Action Service' 7 *CLEER Working Paper*
- Von Bogdandy A, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* 95
Waldron J, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' [Springer] 21 *Law and Philosophy* 137
- Von Bogdandy A, 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' *International Journal of Constitutional Law* 397
- von Bogdandy A, 'The European constitution and European identity: Text and subtext of the Treaty establishing a Constitution for Europe' 3 *International Journal of Constitutional Law* 295
- Von Bogdandy A, 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* 95

- Von Bogdandy A., 'Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law' *International Journal of Constitutional Law* 397
- Waldron J, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' [Springer] 21 *Law and Philosophy* 137
- Waldron J, 'The concept and the rule of law' 43 *Georgia Law Review*
- Walker N, 'The Rule of Law and the EU: Necessity's Mixed Virtue in Palombella G and Walker N (eds), *Relocating the Rule of Law*' (Hart Publishing 2009)
- Walker N, EU Constitutionalism and New Governance in De Búrca G and Scott J (eds), 'Law and New Governance in the EU and the US' (Hart 2006)
- Walker N, The idea of constitutional pluralism 65 *The Modern Law Review* 317
- Watts A, 'The International Rule of Law' 36 *German Yearbook of International Law*
- Weiler J, 'A Constitution for Europe? Some Hard Choices' [Blackwell Publishers Ltd.] 40 *JCMS: Journal of Common Market Studies* 563
- Weiler J, 'The Community System: the Dual Character of Supranationalism' 1 *Yearbook of European Law* 267
- Weiler J, 'The political and legal culture of European integration: An exploratory essay' 9 *International Journal of Constitutional Law* 678
- Wessel RA, 'Reconsidering the Relationship between International and EU Law: Towards a Content-Based Approach?' in Cannizzaro E, Palchetti P and Wessel RA (eds), *International Law as Law of the European Union* (Martinus Nijhoff Publishers 2012)
- Wessel RA, Introduction to the Forum-The Kadi Case: Toward a More Substantive Hierarchy in International Law 5 *Int'l Org L Rev* 323
- White RC, 'A New Era for Human Rights in the European Union' 30 *Yearbook of European Law* (*Yearbook of European Law*, 2011)
- Wiener A, Cosmopolitan P and Reason-Oriented P, 'Global Constitutionalism: Mapping an Emerging Field' (2011)
- Williams AJ, 'The ethos of Europe: values, law and justice in the EU' (Cambridge University Press 2010)
- Williams AJ, *EU human rights policies : a study in irony* (Oxford University Press. 2004)
- Williams AT, 'Taking Values Seriously: Towards a Philosophy of EU Law' 29 *Oxford Journal of Legal Studies* 549

Woolman S, 'The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law' (Juta & Company Ltd 2013)

Wouters J and Ryngaert C, 'Good Governance: Lessons from International Organizations' in Curtin

Wyrozumska A, 'The Charter of Fundamental Rights of the European Union in the Reform Treaty and the Polish objections' 16 The Polish quarterly of international affairs

Zhyznomirska L, 'Externalities of the EU Immigration and Asylum Policy: The Case of Ukraine' Review of European and Russian Affairs

European Union Institutions Documents

Commission

Rules of Procedure of the European Commission, OJ 2000 L 308/26

European Parliament, Council, Commission, *Inter-Institutional Agreement on Better Law-making* (OJ 2003 C321/1)

Joint Communication to the European Parliament and the Council 'Human Rights and Democracy at the Heart of EU External Action – towards a More Effective Approach' of 12 December 2011 (COM (2011) 886 final)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, A renewed EU strategy 2011-14 for Corporate Social Responsibility, 25 October 2011, COM(2011) 681 final

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions 'Increasing the impact of EU Development Policy: an Agenda for Change' COM(2011) 637 final

Communication from the Commission - European Governance: Better lawmaking. COM (2002)275 final (5 June 2002)

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Third strategic review of Better Regulation in the European Union' (COM(2009)

Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions 'Smart Regulation in the European Union' (COM(2010) 543 final)

Communication from the Commission to the Council 'On the Commission Proposals for Action Plans under the European Neighbourhood Policy (ENP) (COM(2004) 795 final)

Communication on Human Rights, Democracy and Development Cooperation Policy, SEC (1991) 6 (1991)

European Governance, A White Paper COM(2001) 428 final <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0137:FIN:EN:PDF>>

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents, 21 March 2011, COM (2011) 137 final

Commission Staff Working Document, Trade and Worst Forms of Child Labour, Brussels, 30 April 2013, SWD(2013) 173 final

Revised EU-Ukraine Action Plan on Freedom, Security and Justice. Challenges and Strategic Aims (2007)

Decision of 19 July 2011 on the rules regarding access to documents, OJ(2011) C 243/16

Recommendations of the Forum on “EU Human Rights Instruments and the Lisbon Treaty: State of Play and Way Forward” (*European Commission*, 12 and 13 July 2010)

Meeting on the Staff Working Document on the Worst Forms of Child Labour and Trade of 10 October 2012,
<http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150023.pdf>

Directorate General External Relations; Directorate General Development; EuropeAid Co-operation Office; Joint Evaluation Unit, *'Evaluation Methods for the European Union's External Assistance* (Office for Official Publications of the European Communities 2006)

Council

Conclusions of the European Council (Copenhagen 21 - 22 June 1993)

330th Foreign Relations Council, Conclusions of 22 July 2014,
http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/144098.pdf.

Draft Council Conclusions on Freedom of Religion or Belief of 11 November 2009, 15510/09, COHOM 250, PESC 1488, COPOL 72

'Valencia Declaration on 'Good Local and Regional Governance - the European challenge', MCL-15 (2007) 5 final' (October 2007)

'Ensuring Protection - European Union Guidelines on Human Rights Defenders'
<<http://www.consilium.europa.eu/uedocs/cmsUpload/GuidelinesDefenders.pdf>>

EU Strategic Framework and Action Plan on Human Rights and Democracy (11855/12)

EU Annual Report on Human Rights and Democracy in the World in 2012 (Thematic Reports) (Council of the European Union 13 May 2013)

Conclusions on Child Labour of 14 June 2010, 10937/1/10, COHOM 156, PESC 780, DEVGEN 201, WTO 218, FREMP 29.

EU Guidelines on the promotion and protection of freedom of religion or belief of 24 June 2013

EEAS

Service ECEEA, 'Joint Staff Working Document on Advancing of the Principle of Complementarity: Toolkit for Bridging the Gap Between International&National Justice'
<http://eeas.europa.eu/human_rights/icc/docs/joint_staff_en.pdf>

European Parliament

Parliament E, 'Rules of Procedure, 7th parliamentary term, January 2014'
<<http://www.europarl.europa.eu/sides/getLastRules.do?language=EN&reference=TOC>>

European Parliament, Council, Commission, *Inter-Institutional Agreement on Better Law-making* (OJ 2003 C321/1)

European Parliament recommendation to the Council of 13 June 2013 on the draft EU Guidelines on the Promotion and Protection of Freedom of Religion or Belief (2013/2082(INI))
<<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-279>>

EU External Policies in Favour of Democratization (16 June 2011)

European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)) (2012)

Human rights dialogues and consultations on human rights with third countries (6 September 2007)

Resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's Policy on the Matter (2010/2202 (INI)) (2010)

Institute for Human Rights and Business, 'Employment & Recruitment Agencies Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'
<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-era-hr-business_en.pdf>

Institute for Human Rights and Business, 'ICT Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'
<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf>

Institute for Human Rights and Business, 'Oil and Gas Sector Guide on Implementing the UN Guiding Principles on Business and Human Rights'

<http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf>

Institute for Human Rights and Business, 'The EU and Human Rights - Making the Impact on People Count' (*Amnesty International International Secretariat*, 2009)

<<http://www.amnesty.org/en/library/asset/IOR61/004/2009/en/64787ed1-83dd-49dd-bd27-c96e773f5ec1/ior610042009eng.pdf>>

Regulations

Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2002 OJ 2012 L 298

Regulation (EC) No 1236/2005 of 27 June 2005 concerning trade in certain goods which could be used for capital punishment, torture or other cruel, inhuman or degrading treatment or punishment, OJ 2005 L 200/1

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/01

Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, OJ 2006 L 386/01

Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences and repealing Council Regulation (EC) No 732/2008, OJ 2012 L 303/1a

Regulation (EC) No 732/2008 of 22 July 2008 applying a scheme of generalised tariff preferences for the period from 1 January 2009 to 31 December 2011 and amending Regulations (EC) No 552/97, No 1933/2006 and Commission Regulations (EC) No 964/2007 and No 1100/2006

Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304/01.

Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ(2001) L 145 , 31/05/2001 P. 0043 - 0048

Agreements

Partnership Agreement between the Members of the African and Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part made on 23 June 2000,

Agreement on partnership and cooperation establishing a partnership between the European Communities and their Member States, of one part, and the Russian Federation, of the other part, of 24 June 1994

European Ombudsman

European Ombudsman, Complaint No 933/2004/JMA, decision of 28 June 2005

Case law

Court of Justice of the European Union

Case C-26/62 *Algemene Transport-en Expeditie Onderneming van Gend en Loos NV v. Nederlandse Belastingadministratie* [1963] ECR 1

Case C-6/64 *Costa v ENEL*, [1964] ECR 585

Case C-26/69 *Stauder v City of Ulm* (ECJ)

Case C-22/70 *EC Commission v EC Council* (the ERTA case), [1971] ECR 263

Case C-4/73 *Nold v Commission* (ECJ)

Case C-93/75 *Mattheus v Doego* [1978] ECR 2203

Case C-104/81 *Hauptzollamt Mainz v C. A., Kupferberg & Cie KG a.A.* [1982] ECR 3641

Case C-294/83 *Partie Ecologiste Les Verts v European Parliament* [1986] ECR 1339

Case C-353/01 P *Mattila v Council and Commission* [2004] ECR I-1073

Case C-93/02 P *Biret International SA v Council* [2003] ECR I-10497

Case C-93/02, *Etablissements Biret et Cie Sa v. Council* [2003,] ECR I-10565

Case C-377/02 *NV Firma Leon Van Parys v. Belgisch Interventie- en Restitutiebureau* [2005] ECR I-1465

Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura and Others* [2005] ECR I-02579

Case 344/04 *The Queen, on the application of International Air Transport Association (IATA) and European Low Fares Airline Association (ELFAA) v Department for Transport* [2006] ECR I-403

Case C-308/06 *The Queen, on the application of International Association of Independent Tanker Owners (Intertanko) and Others v Secretary of State for Transport* [2008] ECR I-4057

Case C-357/09 *PPU Kadzoev* [2009] ECR I-11189

Case C-400/10 *PPU - McB* [2010] ECR p I-8965

Case C-617/10 - *Åkerberg Fransson* [2013] ECR I-0000

Case C-329/11 *Achughbabian* [2011] ECR I-12695

Case C-399/11 *Melloni* [2013] ECR I-0000

Case C-149/96 *Portugal v Council of the EU* [1999] ECR-I8395

Opinion C-2/94 on *Accession by the Community to the ECHR* [1996] ECR I-1759

Opinion C-1/76 of 26 April 1977, [1977] ECR 741

General Court

Case T-174/00 *Biret International SA v Council* [2002] ECR II-00017

Case T-210/00 *Etablissements Biret et Cie Sa v. Council* [2002] ECR II-47

Other Courts

International Court of Justice

Pulp Mills on the River Uruguay (Argentina v. Uruguay),. 2010 ICJ (Apr 20)

European Court of Human Rights

Golder v United Kingdom (1975), Appl. No 4451/70

Bosphorus Hava Yollari Turizm v. Ireland (2005), App. No. 45036/98

Bundesverfassungsgericht

Solange I, BVerfGE 37, 271 2 BvL 52/71, judgment of 29 May 1974

Solange II, BVerfGE 73, 339 2 BvR 197/83, judgment of 22 October 1986

Maastricht-Urteil, BVerfGE 89, 155, judgment of 12 October 1993

Banana, BVerfGE, 2 BvL 1/97, judgment of 7 June 2000

European Arrest Warrant, BVerfGE, 2 BvR 2236/04 judgment of 18 July 2005

Lisabon-Urteil, 2 BvE 2/2008, judgment of 30 June 2009

Honeywell, BVerfGE, 2 BvR 2661/06, judgment of 6 July 2010

United Nations Institutions Documents

United Nations. Office of Public Information., *Teaching human rights; a handbook for teachers* (2d edn, 1963)

Charter of the United Nations , <<http://www.unrol.org/doc.aspx?d=3063>>

The United Nations Rule of Law Indicators - Implementation Guide and Project Tools (United Nations 2011)

International Law Commission. Study Group., Koskenniemi M and Erik Castrén - instituutti., *Fragmentation of international law: difficulties arising from the diversification and expansion of international law* (Erik Castrén Institute of International Law and Human Rights 2007)

The United Nations Rule of Law Indicators - Implementation Guide and Project Tools (United Nations 2011)

United Nations. International Law Commission. Study Group., Koskenniemi M and Erik Castrén -instituutti., *Fragmentation of international law : difficulties arising from the diversification and expansion of international law* (Erik Castrén Institute of International Law and Human Rights 2007)

Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/64/298

Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/64/298

Info A, 'Report: The Secret State of EU Transparency Reforms of 21 March 2011' <http://www.access-info.org/documents/Access_Docs/Advancing/EU/Secret_State_of_EU_Transparency.pdf>

International A, 'Amnesty International Report 2010: The State of the World's Human Rights' <http://www.amnesty.eu/static/documents/2010/Annual_Report_2010%5B1%5D.pdf>

Nations SGotU, 'Annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities, UN Doc A/65/318'

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616

Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616

Report of the Secretary-General on the Strengthening and coordinating United Nations rule of law activities, UN Doc A/63/226

Report of the Secretary-General on the Strengthening and coordinating United Nations rule of law activities, UN Doc A/63/226

Report of the Secretary-General: Uniting our strengths: Enhancing United Nations support for the rule of law, UN Doc A/61/636-S/2006/980

Report of the Secretary-General: Uniting our strengths: Enhancing United Nations support for the rule of law, UN Doc A/61/636-S/2006/980

Fund UND, 'Guidance Note of the Secretary-General on Democracy'
<http://www.un.org/democracyfund/About_Us/UNSG%20Guidance%20Note%20on%20Democracy.pdf>

Websites

Family Reunification Project: <http://familyreunification.eu/index.php/project-publications-4/>

GSP Open Consultations:

http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146362.pdf

Venice Commission: <http://www.venice.coe.int/>

Other Documents

'Input to the drafting process of EU guidelines on the Freedom of Religion or Belief'
<http://www.missioncouncil.se/wp/wp-content/uploads/2012/09/input_drafting_process_EU_guidelines_Freedom_of_Religion_or_Belief.pdf>

'Input to the drafting process of EU guidelines on the Freedom of Religion or Belief'
http://www.missioncouncil.se/wp/wp-content/uploads/2012/09/input_drafting_process_EU_guidelines_Freedom_of_Religion_or_Belief.pdf

Human Rights Watch, 'World Report 2011'
<<http://www.hrw.org/en/reports/2011/01/24/world-report-2011>>

Human Rights Watch, 'Letter: Recommendations concerning the EU Complementarity Toolkit'
<http://www.hrw.org/sites/default/files/related_material/Letter%20on%20the%20EU%20complementarity%20toolkit%20-%20Sept%202013%20-%20Final.pdf>

(Troika) HRDN, 'HRDN response to the adoption of the new EU human rights package by the Foreign Affairs Council on June 25'
<<http://lastradainternational.org/lsidocs/HRDN%20statement%20on%20EU%20human%20rights%20package.pdf>>

'State of Implementation of the Strategy for Innovation and Good Governance SIGG(2010)5 11 February 2011'
<[https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG\(2010\)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG(2010)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679)>

Watch HR, 'World Report 2011' <http://www.hrw.org/en/reports/2011/01/24/world-report-2011>

Governments DaG, 'Food for Thought Paper: Speaking with One Voice on Human Rights and Global Values' <<http://www.ft.dk/samling/20091/almdel/euu/bilag/417/861523.pdf>>

Board IMFE, *Good Governance. The IMF's Role. Guidance Note.* (IMF 1997)

Indicators GM-WG, *A Decade of Measuring the Quality of Governance* (The International Bank for Reconstruction and Development / The World Bank 2006)

'State of Implementation of the Strategy for Innovation and Good Governance SIGG(2010)5 11 February 2011'

<[https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG\(2010\)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679](https://wcd.coe.int/ViewDoc.jsp?Ref=SIGG(2010)5&Language=lanEnglish&Ver=original&Site=DG1-CDLR&BackColorInternet=B9BDEE&BackColorIntranet=FFCD4F&BackColorLogged=FFC679)>

OSCE, *European Security Charter* (OSCE 1999)

'New Hungarian constitution threatens European values ' <<http://www.alde.eu/press/press-and-release-news/press-release/article/new-hungarian-constitution-threatens-european-values-37350/>>

Annex - Overview of EU External Human Rights Instruments on the Basis of the EU Strategic Framework for Human Rights

STATE OF IMPLEMENTATION - 1 January 2014								
Objective	Instrument	Body Responsible	EU Document/Legal Act	Legal Act/Procedur	Addressee	Category of Instruments		
I. Human rights and democracy throughout EU policy								
1. Incorporate human rights in all impact assessments	Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC (2011) 567 final	Commission	Operational Guidance on taking account of Fundamental Rights in Commission Assessments, SEC (2011) 567 final	Commission Staff Working Paper	Commission services	Unilateral (Internal)		
	European Parliament Directorate for Impact Assessment and European Added Value (established in 2012)	Parliament	NA		European Parliament	Institutional change		
	Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy	Parliament	Guidelines on implementation and evaluation of restrictive measures (sanctions) in the framework of the EU Common Foreign and Security Policy, Doc No ST 3068/2013/INIT	Council Conclusions	The Council of the European Union	Unilateral (Internal)		
	Budget Support Steering Committee	Commission	NA		All of the Institutions	Institutional change		
	Guidelines on programming, design and management of budget support (Chapter 4 - fundamental values)	Council	in the process of elaboration	-	All of the Institutions	Unilateral (Internal)		
2. Genuine Partnership with civil society, including at local level	Social due diligence standards	European Investment Bank	in the process of elaboration	-	European Investment Bank	Unilateral (Internal)		
	Consultations	all of the procedures preceding adoption of guidelines, strategies, dialogue, also legislative acts concerning human rights; participation in the Council Working Party on Human Rights (COHOM)	NA	-		Other		
	European Instrument for Human Rights and Democracy	EU Delegations, European Commission	European Instrument for Human Rights and Democracy Implementation of "The roots of democracy and sustainable development: Europe's engagement with various	Article 288 TFEU and the following	civil society	Unilateral (External)		
3. Regular Assessment of Implementation	Reports	EEAS	Various	Joint Working document	Staff all Institutions	Unilateral (Internal)		
II. Promoting the universality of human rights								
4. Universal Adherence	Promotion of ratification and effective implementation of key international human rights treaties, including regional human rights instruments.		NA		EEAS, European Commission,	Multilateral (diplomacy)		

5. A culture of human rights and democracy in EU external action	Collaboration with third countries to fully cooperate with UN Special Rapporteurs and Independent Experts on human rights, including through issuing standing invitations and receiving such experts.	third countries	NA	NA	EEAS, European Commission, Member States	Multilateral diplomacy)	(UN
	Training on human rights and democracy for all staff: EEAS, Commission, EU Delegations, CSDP missions and operations.	internal	NA	NA	EEAS, European Commission	Institutional change	
	Completion of a network of focal points on human rights and democracy in EU Delegations and CSDP missions and operations.	internal	NA	NA	EEAS, European Commission	Institutional change	
	Expansion of the practice of working on human rights issues through human rights working groups formed locally among EU Delegations and embassies of Member States.	EEAS	NA	NA	EEAS	Institutional change	
III. Pursuing coherent policy objectives							
6. Effective support to democracy objectives	>> Democracy reports and plans of action on the first generation Moldova (Eastern Partnership) Kyrgyzstan (Central Asia) Lebanon (Southern Neighbourhood) Ghana, Benin, Solomon Islands and Central African Republic (ACP) Bolivia (Latin America) Mongolia, Philippines, Indonesia, Maldives (Asia)	EEAS and EU Delegations and the European Commission	>> According to the 2012 EU HRS Report, for 9 of the pilot countries the joint report has been produced following the reporting back from the delegations. The 9 countries involved: Note Benin, Bolivia, Ghana, Lebanon, Indonesia, Kyrgyzstan, Maldives, Mongolia and the Solomon Islands. The Central African Republic, Moldova and	Staff joint document	all institutions	Unilateral (internal)	
	>>> Identification of the second generation of pilot countries.						
	Development of EU joint comprehensive democracy support plans and programmes on the basis of the pilot countries exercise outcome, for third countries where the EU is actively engaged in democracy support.	EEAS, the European Commission	in the process of elaboration	NA	all institutions	Unilateral (internal)	
	Systematise follow-up use of EU Election Observation Missions and their reports in support of the whole electoral cycle, and ensure effective implementation of their recommendations, as well as the reports of other election observation bodies (eg OSCE/ODIHR).	Council EEAS Commission Member States	No data	NA	all institutions	Unilateral (internal)	

7. A standing capability on human rights and democracy in the Council of the EU	Establish a Brussels formation of COHOM.	Council of the European Union	NA			Council of the European Union	Institutional change
	Development of arrangements for burden sharing in order to make the best use of Member State capabilities and expertise in pursuing the EU human rights policy.	Council of the European Union, Member States	NA			all institutions and the Member States	Institutional change
	Intensification of cooperation between the Council working parties on fundamental rights (FREMP) and human rights (COHOM).	Council of the European Union	No data			Council of the European Union	Other
8. Achieving greater policy coherence	Periodic exchanges of views among Member States on best practice in implementing human rights treaties.	EEAS Member States	No data			all institutions Member States	Other
	Referencing ALL EU documents to relevant UN and Council of Europe human rights instruments, as well as the EU Charter of Fundamental Rights.	EEAS European Commission	NA			all institutions	Institutional change
	Shaping the Agenda on the UN level with reference to social and cultural rights	EEAS European Commission Member States	NA			UN	Multilateral (UN diplomacy)
9. Respect for economic, social and cultural rights							
IV. Human rights in all EU external policies							
	Development of a toolbox for HRBAD	EEAS European Commission Member States		Parliament Resolution of 23 October 2012: Agenda for Change: the future of EU development policy, 2012/2002 (INI)	Parliament Resolution, Council Conclusions, EU Regulation	all institutions Member States	Unilateral (internal)
	Development of human rights oriented assessment of development activities	EEAS European Commission		Instrument 2014-2020 adopted on 15 May 2012		all institutions	Institutional change
11. Make trade work in a way that helps human rights	Integration of human rights advocacy in global activities globally	EEAS European Commission		Council Conclusions on Increasing the Impact of EU Development Policy on	NA	Council of the European Union	Unilateral (internal)
	Develop methodology to launch human rights programmes together with launching new trade agreements	EEAS European Commission Member States		Operational Guidance on taking account of Fundamental Rights in Commission Impact	Staff Working Document of	partner countries	Unilateral (internal)
	Reinforce human rights dialogues with FTA partners and strengthening of GSP plus mechanism.	EEAS European Commission (for GSP beneficiaries)		FTAs 2012 GSP Regulation		partner countries	Bilateral/Multilateral Unilateral (external)
	Inclusion human rights elements in the investment policy.	EEAS European Commission Member States		FTAs		partner countries	Bilateral/Multilateral

	Review Regulation 1236/2005 on trade in goods which can be used for capital punishment or torture to ensure improved implementation.	European Commission Council	25 October 2012 - new GSP regulation (Regulation No 978/2012)	Article 288 TFEU and the following	partner countries	Unilateral (external)
	Review of Council Common Position 2008/944/CFSP on Arms Exports takes account of human rights and International Humanitarian Law taking into account Development of human rights criteria that are to be Included into international arms treaties	EEAS European Commission Member States EEAS Member States EEAS	Council Common Position 2008/944/CFSP on international agreements 2010 Council's Report Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions, 17138/1/10 REV 1 Council Handbook: Mainstreaming Human Rights and Gender into European and Security Policy, 2008	Council	partner countries	Unilateral (external)
12. Reflect human rights in conflict prevention and crisis management activities	Expansion of the catalogue of early warning system indicators to include human rights IHL relevant benchmarking, planning, and evaluation and mandating of the Missions accordingly Operationalise the EU comprehensive approach on implementing UNSC resolutions 1325 and 1820 on Women, Peace and Security Devise a mechanism for accountability in case of possible breaches of the Code of Conduct by operation or mission staff.	EEAS EUSRS CSDP missions Commission EEAS Council Commission	2009/1044/CFSP on international agreements 2010 Council's Report Lessons and best practices of mainstreaming human rights and gender into CSDP military operations and civilian missions, 17138/1/10 REV 1 Council Handbook: Mainstreaming Human Rights and Gender into European and Security Policy, 2008	Article 218 TFEU Note NA NA NA	partner countries EEAS European Commission EU Missions individuals in third countries EU Missions	Bilateral/Multilateral Unilateral (internal) Unilateral (internal) Unilateral (internal) Unilateral (internal)
13. Entrench human rights in counter-terrorism activities	Development operational guidance to ensure the consideration of human rights, and where applicable IHL, in the planning and implementation of counter-terrorism assistance projects with third countries, in particular as regards the respect of due process requirements (presumption of innocence, fair trial, rights of the defence).	EEAS CTC Commission Commission Anti-trafficking Coordinator EEAS	in the process of elaboration	NA	all institutions	Unilateral (internal)
14. Ensure human rights underpin the external dimension of work in the area of 'freedom, security and justice' (FSJ)	Antiterrorist Dialogues with human rights components Develop a list of countries - partners in the area of human trafficking. Training of diplomatic and consular staff, in order to detect and handle cases where trafficking is suspected. Ensure that human rights are taken into consideration during th FSJ Sub-Committees with third countries	EEAS CTC Commission Commission Anti-trafficking Coordinator EEAS EEAS Member States EEAS European Commission	dialogue EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016 Directive 2011/36/EU on preventing and combating trafficking in human beings NA dialogue	NA Communication NA NA	EEAS EEAS European Commission Institutions Institutions	Bilateral/Multilateral (diplomacy) Unilateral (internal) Institutional change Bilateral/Multilateral

15. Ensure promotion of human rights in the external dimension of employment and social policy V. Implementing EU priorities on human rights	Promotion of four ILO core standards	EEAS Council of European Union	NA	NA	NA	third countries	Other
16. Abolition of the death penalty	Lobbying on the UNGA 67 Resolution on the death penalty moratorium, in order to increase support among States while developing also further the content of the initiative. Undertake targeted campaigns on the death penalty and intensify engagement with retentionist countries.	EEAS Member States	NA	NA	NA	UN	Multilateral (diplomacy)
17. Eradication of torture and other cruel, inhuman or degrading treatment or punishment	Ensure EU input to the World Congress against the Death Penalty 2013. Support and implement UN and Council of Europe anti-torture efforts, including support for the UN Special Rapporteur on Torture, the UN Voluntary Fund for the Victims of Torture, the OHCHR, UNCAT, SPT and CPT. Promote ratification and effective implementation of CAT and OPCAT emphasising the role of independent and effective National Preventive Mechanisms. Integrate torture prevention measures into all FSJ activities, including those related to law enforcement purposes.	EEAS Member States EEAS Member States	dialogue	NA	NA	third countries	Bilateral/Multilateral (diplomacy) Multilateral (diplomacy)
18. Effective support to Human Rights Defenders	Develop and implement a voluntary initiative to facilitate the provision of temporary shelter to human rights defenders at risk.	EEAS Member States Commission	dialogue	EU Guidelines on Torture update of 20 March 2012, 6129/1/12, REV1, COHOM 57_PESC 326.	Council of the European Union	third countries	Bilateral/Multilateral (diplomacy) Unilateral (internal)
	Promote improved access by human rights defenders to the UN and regional human rights protection mechanisms, and address the issue of reprisals against defenders engaging with those mechanisms. Publish contact details of the human rights focal points of all EU missions, as well as EU Liaison Officers on human rights defenders on the websites of the EEAS and EU Delegations.	EEAS Member States Commission	NA	GHK Consulting Report for NA	HRs defenders all institutions Member States		Multilateral (diplomacy) Unilateral (internal)
19. Promotion and protection of children's rights	Campaign on the rights of the child with a specific focus on violence against children.	EEAS Commission	NA	http://www.eidhr.eu/focal-points#	NA	3rd countries	Other

	Step up efforts to implement the Revised Implementation Strategy of the EU Guidelines on Children and Armed Conflict, and in particular continue to support the work of the UN SGSR CAAC and UNICEF.	EEAS Commission	NA				Multilateral diplomacy)	(UN
	Ensure EU input to the World Conference against Child Labour.	EEAS Commission	NA				Multilateral diplomacy)	(UN
	Promote the establishment of up-to-date hazardous work lists (C182, Article 4).	Commission Member States	EUROPEAN COMMISSION, COMMISSION STAFF WORKING DOCUMENT, Decision of the Council	Commission Staff Working Document	all institutions	3rd countries	Unilateral (internal)	
	Campaign on political and economic participation of women with special focus on countries in transition.	EEAS	NA			3rd countries NGOs	Other	
20. Protection of the rights of women, and protection against gender-based violence	Support relevant initiatives against harmful traditional practices, in particular FGM (female genital mutilation).	EEAS Member States	NA			3rd countries NGOs	Other	
	Promote the prevention of early and forced marriages affecting children.	EEAS Member States	NA			3rd countries NGOs	Other	
	Implement the nine specific objectives of the EU plan of action for gender equality and women's empowerment in development 2010-15.	Member States Commission EEAS	EU Plan of Action on Gender Equality and Women's Empowerment in Development 2010-2015, 8 March 2010, SEC(2010) 265	Commission Working Document	all institutions		Unilateral (internal)	
	Support initiatives, including of civil society, against gender based violence and femicide.	Member States Commission EEAS	NA			3rd countries NGOs	Other	
21. Compliance with international humanitarian law (IHL)	Implement the pledges made by the EU at the 31st International Conference of the Red Cross and Red Crescent.	Member States Commission EEAS					Other	
	Support IHL dissemination to all warring parties, including armed non State actors.	EEAS Commission					Other	
22. Enjoyment of human rights by LGBT persons	Political dialogue (objective: to encourage third countries to ratify core IHL instruments and implement IHL obligations).	EEAS Commission	dialogue				Bilateral/Multilateral (diplomacy)	
	Promote adhesion by third countries to the Montreux Document on Private Military and Security Companies.	EEAS Member States					Other	
	EU guidelines, building upon the EU's LGBT (lesbian, gay, bisexual, transsexual) toolkit.	Council	Guidelines to promote and protect the enjoyment of all Human Rights by lesbian, gay, bisexual, transgender	Decision of the Council of the European Union	all institutions		Unilateral (internal)	

	EU strategy on how to cooperate with third countries on human rights of LGBT persons, including within the UN and the Council of Europe. Promoting adoption of commitments in the area of human rights of LGBT within the OSCE, including through organisation of a public event in the OSCE framework.	Member States EEAS		Strategy (steps not taken)			Unilateral (internal)
23. Freedom of Religion or Belief	EU Guidelines on Freedom of Religion or Belief (FoRB) building upon existing instruments and documents, recalling key principles and containing clearly defined priorities and tools for the promotion of FoRB worldwide.	Council		EU Guidelines on the promotion and protection of freedom of religion or belief of 24 June 2013	Decision of the Council of the European Union	all institutions	Unilateral (internal)
	Initiatives at the UN level on freedom of religion or belief.	EEAS Member States	NA	NA			Multilateral (UN diplomacy)
24. Freedom of expression online and offline	Promote initiatives at the level of OSCE and the Council of Europe and contribute to better implementation of commitments in the area of Freedom of Religion or Belief.	EEAS Member States	NA	NA		other regional organisations	Other
	Guidelines on Freedom of expression online and offline, including the protection of bloggers and journalists.	Council		Final draft of Guidelines is undergoing consultation process	NA	all institutions	Unilateral (internal)
	Measures and tools to expand internet access, openness and resilience to address indiscriminate censorship or mass surveillance when using ICTs; empower stakeholders to use ICTs to promote human rights, taking into account privacy and personal data protection.	Member States Commission EEAS		European Instrument for Human Rights and Democracy		3rd countries NGOs	Other
	Human Rights impact assessment is present in the development of policies and programmes relating to cyber security, the fight against cyber crime, internet governance and other EU policies in this regard.	EEAS Commission		No data	NA	all institutions	Unilateral (internal)
	Include human rights violations as one of the reasons following which non-listed items may be subject to export restrictions by Member States.	Council Member States Commission		No data			Unilateral (external)
25. Implementation of the UN Guiding Principles on Business and human rights	Implementation of the Commission Communication on Corporate Social Responsibility.	Commission	NA	NA	NA	all institutions, businesses in the EU and	Unilateral (internal)
	Report on EU priorities for the effective implementation of the UN Guiding Principles.	Commission		Three Guidance Handbooks: on Recruitment Agencies, ICT and Gas and Oil in the process of elaboration	Handbooks published by the European Commission	all institutions Member States	Unilateral (internal)
	National plans for EU Member States on implementation of the UN Guiding Principles.	Member States			NA	Member States	Unilateral (internal)

26. Administration of justice	Campaign on justice, focusing on the right to a fair trial.	EEAS		No data			3rd countries NGOs	Other
	Continue to ensure monitoring of important human rights related trials, in particular trials against human rights defenders.	EU HoMs EU Delegations	NA	NA	NA	all institutions	Unilateral (internal)	
27. Responding to violations: ensuring accountability	Implement the updated Decision on the ICC (2011/168/CFSP), adopted on 21 March 2011 and the associated action plan, including by promoting ratification and implementation of the Rome Statute.	Member States EEAS Commission	High Representative of the European Union for Foreign Affairs and the Security Policy, European Commission, 'Joint Working Document on Advancing the Principle of Complementarity', of 31 January 2013, SWD (2013) 26 final Council of the European	Staff Joint Working document Delegations of the EU	Unilateral (internal)			
	Promote and contribute to strengthening the capacity of national judicial systems to investigate and prosecute these crimes.	EEAS Member States			Other			
	Develop policy on transitional justice	EEAS Commission Member States			Other			
28. Promote the respect of the rights of persons belonging to minorities	Review best practice and ensure the use of existing EU instruments to support efforts to protect and promote the rights of persons belonging to minorities, in particular in dialogues with third countries.	EEAS Commission Member States	NA	NA	Bilateral/Multilateral			
29. A strengthened policy on indigenous issues	EU policy relative to the UN Declaration on the Rights of Indigenous Peoples, with a view to the 2014 World Conference on Indigenous Peoples	EEAS Commission Member States	NA	NA	Multilateral (UN diplomacy)			
30. Enjoyment of human rights by persons with disabilities	Development programmes, in the framework of the European Disability Strategy 2010-2020 and implementation of the UN Convention on the Rights of Persons with Disabilities.	Commission EEAS	SIXTH DISABILITY HIGH LEVEL GROUP REPORT ON THE IMPLEMENTATION OF THE UN CONVENTION ON THE RIGHTS OF PERSONS WITH EUROPEAN COMMISSION (DEVCO: D3 "SOCIAL AND HUMAN DEVELOPMENT & MIGRATION"), Guidance	Commission Working Document	Unilateral (internal)	Commission, UN		
	Guidance Note on Disability and Development to be in line with the UN Convention on the Rights of Person with Disabilities.	Commission		Commission Working Document	Unilateral (internal)	EU institutions staff		
VI. Working with bilateral partners								
31. Impact on the ground through tailor-made approaches	Human rights country strategies in third countries and complete the ongoing first round.(develop, assess, identify best practices)	EEAS Commission Member States	Up to 13 May 2013 ab 140 country strategies were adopted, subsequently the review process has been	European Commission EEAS	Unilateral (external)	partner countries, EU institutions		
	Ensure Implementation of Country Strategies	EEAS Commission Member States			Other			
	Mainstreaming Strategies	EEAS Commission Member States	48 out of 140 human rights strategies were endorsed by the PSC, in December	Council decision	Unilateral (internal)	EEAS Commission Member States		

	Reporting and Reviewing of Strategies	EU Delegations, EU HoMs	Up to 13 May 2013 ab 140 country strategies were adopted, subsequently the ENP Progress Report	European Commission EEAS	partner countries, institutions	Unilateral (external)
	Systematise follow-up of the ENP progress reports	EEAS Commission		European Commission EEAS	partner countries, EU institutions	Unilateral (external)
32. Impact through dialogue	Establish priorities, objectives, indicators of progress for EU human rights dialogues and consultations, to facilitate their review.	EEAS Commission				Bilateral/Multilateral
	Perform a review regarding best practice in applying Articles 8 and 96 of the Cotonou Agreement, including how to ensure follow up.	EEAS Commission				Bilateral/Multilateral
	Make full use of recommendations from UPR, Treaty Monitoring Bodies and Special Procedures in engagement with third countries.	EEAS Commission Member States				Bilateral/Multilateral
	Further develop working methods to ensure the best articulation between dialogue, targeted support, incentives and restrictive measures.	EEAS Commission Member States	debate opened	NA	all institutions	Unilateral (internal)
33. Effective use and interplay of EU external policy instruments	Develop criteria for application of the human rights clause.	EEAS Member States Commission				Bilateral/Multilateral
VII. Working through multilateral institutions						
34. Advance effective multilateralism	Develop and agree an annual approach to the identification of human rights priorities at the UN – and where relevant the ILO.	EEAS Member States	UN and ILO forums			Multilateral (UN diplomacy)
35. Effective burden sharing in the UN context	Strengthen the existing system of burden sharing.	EEAS Member States	all institutions Member States third countries			Other
36. Strengthened regional mechanisms for human rights	Continue to engage with the Council of Europe and the OSCE and other regional organisations	EEAS Member States	third countries international organisations			Bilateral/Multilateral (diplomacy)